

# **The Brexit's Giants Causeway. Analysis of the possible solutions to the Irish Border issue Post-Brexit.**



***-Trabajo de Fin de Máster-***

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**Fecha de entrega: 8 de mayo de 2020**

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## **ABBREVIATION LIST**

1. CAP: Common Agricultural Policy.
2. CFP: Common Fisheries Policy.
3. CTA: Common Travel Area.
4. DUP: Democratic Unionist Party.
5. ECJ: European Court of Justice.
6. ECSC: European Coal and Steel Community.
7. EEA: European Economic Area.
8. EEC: European Economic Community.
9. EFTA: European Free Trade Agreement.
10. EP: European Parliament.
11. EU: European Union.
12. GATT: General Agreement on Tariffs and Trade.
13. IE: Ireland (Republic of Ireland).
14. IFI: International Fund for Ireland.
15. IRA: Irish Republican Army.
16. MPs: Members of Parliament (House of Commons).
17. NATO: North Atlantic Treaty Organization.
18. NI: Northern Ireland.
19. NICRA: Northern Ireland Civil Rights Association.
20. PIRA: Provisional Irish Republican Army.
21. PM: Prime Minister (UK).
22. SEA: Single European Act.
23. TEU: Treaty on the European Union.
24. TWI: Trade Weigh Index.
25. UK: United Kingdom (United Kingdom of Great Britain and Northern Ireland).
26. VAT: Value-added Tax.
27. WTO: World Trade Organization.

## 1. INTRODUCTION

Since the creation of the European Coal and Steel Community (ECSC) in 1952 and of the European Economic Community (EEC) in 1957 and the evolution of it to the European Union (EU) as we know it in the early 90's, none of the State Members or the leaders of the Community thought that someday, one of the members of the Community decided to leave the group. In this final master project, entitled "*The Brexit's Giants Causeway. Analysis of the possible solutions to the Irish border issue Post-Brexit*", we will try to delve into the conflict that emerged again over the Irish border due to Brexit and we will analyse some solutions proposed by the doctrine to solve this circumstance (even we will propose a mixed own-made solution to the issue).

Brexit set a precedent that was believed, as has been said, unthinkable. The withdrawal of the United Kingdom (UK) from the European project creates several situations that are difficult to manage due to their importance. One of them is the situation on the Irish border. Although it is true that it is not the only Member State of the European Union that has a land border with the UK (Remember that Spain has the border area of the southern province of Cádiz with Gibraltar), the Irish border has always been on the table of negotiations as one of the hottest and most difficult points to manage. The importance of this border and the concern about the possible consequences of a Brexit without agreement in that area, reside, fundamentally, in the violent and tense history that exists between the area of the Republic and the northern area, which ended in 1998.

The Republic of Ireland and UK have had for decades certain tensions, which have even led to armed conflict from the late 60's to the late 90's in Northern Ireland.<sup>1</sup> The most recent conflict, finished in 1998, with the signature of the Good Friday Agreement (GFA) (as the Catholic society named it), also known as The Belfast Agreement (as the protestant society named the document)<sup>2</sup>. But this has not been a struggle that just had its violent moments in the 20<sup>th</sup> century. Ever since from the first inhabitants of the island of Great Britain who went to the Island of Ireland to evangelize the Celts, conflicts emerged in the VIII century. What at first was a confrontation of different religions Christianity against Celtic paganism, became a conflict between different creeds in Christianity in the reign of Henry VIII.<sup>3</sup>

Tensions flared in the Cromwell government, and legislative measures were taken to punish the profession of the Catholic faith on both British and Irish territory<sup>4</sup>. Already during the time that Ireland was annexed to the UK, since the signing of the

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<sup>1</sup> JEFF WALLENFELDT. *The Troubles*. Encyclopædia Britannica, inc. May 14, 2019. London. [online][date of access: 28/02/2020] Available at: <https://www.britannica.com/event/The-Troubles-Northern-Ireland-history>

<sup>2</sup> UK GOVERNMENT, NORTHERN IRELAND'S GOVERNMENT AND IRELAND'S GOVERNMENT. Belfast. *The Good Friday Agreement (The Belfast Agreement)*. 1998 [online][date of access: 05/02/2020] Available at: <https://www.dfa.ie/media/dfa/alldfawebsitemedia/ourrolesandpolicies/northernireland/good-friday-agreement.pdf>

<sup>3</sup> *Conflicto nor-irlandés. Antecedentes*. [online][date of access: 29/02/2020]. Available at: [https://es.wikipedia.org/wiki/Conflicto\\_norirland%C3%A9s#Antecedentes](https://es.wikipedia.org/wiki/Conflicto_norirland%C3%A9s#Antecedentes)

<sup>4</sup> *Penal Laws*. Encyclopædia Britannica, inc. London. March 27, 2008. [on line] [date of access: 05/11/2019]. Available at: <https://www.britannica.com/event/Penal-Laws>

Union Act in 1801,<sup>5</sup> these discriminatory laws continued to apply against the Catholic population, not only from Ireland, but also from the UK. Although the laws punishing the practice of Catholicism were abolished in the 1830s, their consequences were still de facto visible in Irish society, where, remember, the vast majority of the population is Catholic<sup>6</sup>.

Despite the abolition of the Penal Laws a decade earlier, in the mid-1940s, the Great Famine (1845-1849), revealed the great differences between the British and Irish landowners. The Irish population suffered from emanation over the absence of potatoes and evictions due to lack of rent payments. As a result, deaths among that spectrum of the population due to starvation and freezing grew exponentially.<sup>7</sup> While the Irish suffered such misfortunes, British landowners continued their commercial activities. In addition, countries like the United States, where many Irish people had fled due to famine, were subjected to quotas in exports of food and supplies to the Irish population, by order of the UK itself<sup>8</sup>.

Afterwards in 1922, when Ireland achieved independence from the UK (after an independence war<sup>9</sup>), forming the Free State of Ireland (*Saorstát Éireann*), relations between the two States became more tense, until 1949, when the Republic of Ireland was created as it is known today (after several years with some uncertainty regarding how the territory should be governed), entirely independent of the UK and outside the British Commonwealth of Nations.<sup>10</sup>

Since the independence of the Republic of the British Empire, the relations with UK were very tense, even during part of the membership of UK in the EEC/EU (during *The Troubles*), until the *entente cordiale* created with the GFA. As we said before, the main goal of this paper is to glimpse what would be the better solution to the Irish border issue, regarding the difficult situation created by the Brexit, and if this solution can protect the GFA in all senses. We understand that the border between the two Irelands is one of the pillars of the Brexit negotiations, due to the aforementioned historical background and the social and political demands of the Irish island to maintain the cordial relations established in 1998.

The legal problem that Brexit presented to us (taking into account the brief historical excursus made previously) place two questions on the table, which we should know how to answer or have a slight idea of the result at the end of this analysis. The

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<sup>5</sup> *Act of Union*. Encyclopædia Britannica, inc. London. January 01, 2020. [online][date of access: 03/01/2020]. Available at: <https://www.britannica.com/event/Act-of-Union-United-Kingdom-1801>

<sup>6</sup> *Catholic Emancipation*. Encyclopædia Britannica, inc. London. April 24, 2019. [on line] [date of access: 05/11/2019]. Available at: <https://www.britannica.com/event/Catholic-Emancipation>

<sup>7</sup> *Irish Potato Famine*. History.com Editors. October 2017 (updated July 2019). [online][date of access: 26/12/2019] Available at: <https://www.history.com/topics/immigration/irish-potato-famine>

<sup>8</sup> WOODHAM-SMITH, CECIL. *The Great Hunger: Ireland: 1845-1849*. 1962. 1st Edition. Hamish Hamilton Editions. London., pages 48-49.

<sup>9</sup> *The Anglo-Irish War*. BBC Home. 24th September 2014. London. [online][date of access: 19th March 2020] Available at: <https://www.bbc.co.uk/history/british/easterising/aftermath/af04.shtml>

<sup>10</sup> *Irlanda*. Wikipedia. 22nd August 2003. [online][date of Access: 15th March 2020] Available at: <https://es.wikipedia.org/wiki/Irlanda>

first of all is: what would be, in the framework of Brexit and in the territory of the island of Ireland, the solution so that the establishment of a hard border between the two Irelands can be effectively avoided, and the GFA can be protected? (this is the main goal of our paper); and the second question, related to the establishment or not of a hard border in Ireland, is our thesis: Brexit (a hard one) can end the *entente cordiale* between established by the GFA in 1998.

To answer the first question, we are going to analyse, at the end of the paper, several proposals to solve the Irish border issue. And to answer the second one, to verify our thesis, we will use the rest of the paper (including this introduction) to try to envisage this answer. But first, is proper to study the previous context (during the UK's membership in the EU and Brexit).

The methodology used to prepare this work is mainly based on an analysis of both doctrinal and normative sources related to the topic as well as the use of newspaper articles. The doctrinal sources have served to create a knowledge basis about the Brexit, and possible solutions to the border problem. The use and analysis of normative sources of information has served to be able to delve deeper into the subject and to visualize all the points that have been working in the field of Brexit negotiations. Also it is been used infographic sources, useful to have a first approach to some points of the work, as well as documental sources, in which we can include some letters written by the UK's PM David Cameron and Theresa May to the President of the European Council Donald Tusk. At the end of the paper, we will see the use of quantitative sources as EU Commission graphics and own-made graphics, to illustrate the last section of this work.

This project is composed by 3 sections: in the first one, we will talk about how was the accession of the Republic of Ireland and the UK to the EEC and its relations during the membership of the UK in the EEC/EU, with a little reference to the PEACE programme, initiated by the EU in 1995; the second section, relating to the Brexit, we will address what Brexit is, what was the path that UK took until the day of the referendum, and several items regarding the voting itself. After that we will point the general sections of the negotiation and the specific ones on the Irish border issue, and a proposal from the European Commission and the Theresa May's government, the *Backstop*. On the last one, we are going to talk about the situation after the Brexit, in what point the negotiations are to this date and its implications, the implementation or transition period and several proposals to solve the border issue, including an own-created solution for the issue.

## 2. ACCESSION OF IRELAND AND UK TO THE EEC AND RELATIONS DURING THE MEMBERSHIP OF THE UK.

The joining of Ireland and the UK to the EEC is our first point to talk about. The importance of this fact implied, in the day that the accession was effective, within the Community, the Franco-German axis was no more the leading force. The entrance of the UK to the EEC created a new *status quo*, where the power began to be divided between France, Germany and UK.

Before the accession of UK and Ireland to the EEC, in 1959 the UK joined the European Free Trade Agreement (EFTA). But, before that accession, the UK did not want to participate of the European project, initiated with the creation of the ECSC. The country had strong relations with the United States, and, in that moment, they only were part of the North Atlantic Treaty Organization (NATO), the Brussels Treaty and the Council of Europe. Those times were decolonisation periods and the UK were one of the few countries that still retain some colonial territory.<sup>11</sup>

The accession of Ireland and the UK in the EEC was effective in 1973, but the Accession Treaty and Annexes and Protocols were signed in 1972, with Denmark. The petition to join the Communities was sent in 1961 by Ireland, the UK, Denmark and Norway, but, the French President Charles de Gaulle, voted against the accession of the UK (what was also harmful for Ireland and Denmark). De Gaulle argued that, the entrance of the British in the Community would be a serious problem, because of the supposed influence of the United States in the British territory. That French opposition was established again in 1967, and, in consequence, the negotiations with those countries were blocked.<sup>12</sup>

In 1973, only 3 out of the 4 countries that applied for the entrance to the Union (Norway rejected to join the EEC after the celebration of a referendum) became Member States. The Accession Treaty<sup>13</sup> regulated the conditions of entrance in the Community for the applicants. Obviously, in that treaty, there was a section for subjects as, implementation of Communitarian laws in some aspects like trade, capitals, agriculture, and fishing rights, and representation weight in the European institutions. That type of subjects were regulated in the Annexes.

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<sup>11</sup> DE AREILZA CARVAJAL, JOSÉ M. *El Reino Unido en la Unión Europea*. Estudios de Política Exterior. Mayo-Junio 1996. N°51. [online] [date of Access: 30th March 2020] Available at: <https://www.politicaexterior.com/articulos/politica-exterior/el-reino-unido-en-la-union-europea/>

<sup>12</sup> ¿Anticipó Charles de Gaulle el Brexit? Stéphanie Trouillard. France 24. 20th October 2019. [online] [date of access: 29/02/2020] Available at: <https://www.france24.com/es/20191020-predico-de-gaulle-brexit-francia-reino-unido>

<sup>13</sup> *Treaty between the Kingdom of Belgium, the Federal republic of Germany, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of Netherlands (Member States of the European Communities), the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland concerning the accession of the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland to the European Economic Community and to the European Atomic Energy Community*. Official Journal of the European Economic Community. March 1972. Brussels. [on line][date of access: 01/02/2020] Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:11972B/TXT&from=ES>

Considering all this, is proper to analyse briefly which the conditions of the accession were for both countries in some aspects that are important, as well as the relations between the two nations and the EU's position regarding the conflict.

## 2.1. Conditions of accession

This section has the principal aim to analyse using the base of the Accession Treaty text, what were the legal accession conditions of both countries in the EEC. We consider that it would be appropriate to see, several assets, such as the representatives in the Institutions of the different Communities, the Common Custom Tariffs, and elimination of the quantitative restrictions (one of the pillars of the Common Market) or fisheries.

In this part, we see that, comparing the number of Irish and British representatives or delegates in the three institutions (ECSC, EURATOM and EEC), there was a big difference. UK had 36 representatives and Ireland only 10 in the Assembly (Art. 10). That gap also has a negative consequence to Ireland, because of the lesser power weight in the Council and its decisions. That contrast is also established in article 21, where we can see that Ireland had 9 representatives in the Economic and Social Committee, and the UK, 24.<sup>14</sup>

Taking into account this situation, we can see that in some articles of the Treaty the differences of application of some measures for the two countries were, in some aspects, very different, or the same for both of them. This can lead us to consider if the European Communities were taking into account the aspect of country population in a wide point of view and create situations not favourable to both countries at all and some inequities.

In article 39, we notice that is the first time we see regulated the Common Customs Tariff.<sup>15</sup> In article 40, in relation to the previous article, we observe that the EEC gave Ireland 4 years period to fully apply the tariff. These periods were directed to establish a reduction of the 50% of the Irish Tariffs in 1976. The fact that the UK is not mentioned in this article, that led to believe that the UK was capable of apply the Tariff without different periods of adaptation.

One of the most important items in the EEC acquis ( and in the EU one), is the abolishing of the quantitative restrictions. In article 43, the elimination of this type of constrains is again, different for some of the States. Ireland had a period of 5 years to maintain the export's restriction to *waste and scrap metal of iron or steel*. The only condition to maintain them is that they couldn't be more detrimental for the Member States than for third States.

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<sup>14</sup> As today, the number of representatives in the organs of the EEC, were established regarding the population of the Member States. In 1973, Ireland had 3.111.100 million of habitants and the United Kingdom had 56.229.268 million of habitants. This data is available at <https://datosmacro.expansion.com/demografia/poblacion/uk> and <https://datosmacro.expansion.com/demografia/poblacion/irlanda?anio=1973>

<sup>15</sup> See at: [https://ec.europa.eu/taxation\\_customs/business/calculation-customs-duties/what-is-common-customs-tariff\\_en](https://ec.europa.eu/taxation_customs/business/calculation-customs-duties/what-is-common-customs-tariff_en)



In terms of trade nomenclature, the UK had a period of 1 year for maintaining their own system and to adapt into the new one (Art. 46.2 p.1). Although we can think that the nomenclature is something piddling, for a country we must think that the system of trade classification is the central pillar of a trade system, and also consider that it was one of the main points of the treaty. For a unified trade system as the EEC, everyone has to “talk the same language”, in terms of trade.

In article 48 we notice something very interesting. We observe how the EEC takes into account the Anglo-Irish Free Trade Area Agreement. That document was signed by the UK and Ireland in 1965, with Sean Lemass as Taoiseach and Harold Wilson as Prime Minister of the UK, during the France’s veto to the accession of the UK to the EEC. That Agreement (Anglo-Irish Free Trade Area Agreement) had its roots in the General Agreement on Tariffs and Trade (GATT), in terms of abolishing customs barriers between countries. Therefore, this Agreement didn’t have the unanimous satisfied reaction in the Irish government. The fact that Ireland signed an agreement with the UK on free trade, led some members of Lemass’s Government to think that it would be harmful for Ireland in terms of industrial competitiveness.<sup>16</sup>

The Article 48.1 of the Accession Treaty was written as follows:

*“1. The provisions of this Title shall not prevent Ireland from applying to products originating in the United Kingdom arrangements enabling customs duties and protective elements contained in customs duties of a fiscal nature to be eliminated more rapidly, in accordance with the Anglo-Irish Free Trade Area Agreement, signed on 14 December 1965, and related Agreements.”*

What we can observe here, is a benefit to Ireland in terms of placing the Irish economy to the same level as the other Member States, the new and the original ones. The article previously mentioned talks about Ireland as the country that could apply the dispositions of the Anglo-Irish Free Trade Area Agreement, not the UK. We can consider that as a helpful position for the Irish since it was evident that Ireland was not at the same economic level as the UK was at all.

One of the most important items is article 100 that develops the aspects about fisheries and the inherent rights of the coastal countries. In fact, the Treaty was establishing a possibility of restriction of 9 years imposed by the member States (from 1973 to 1982) according to the Regulation (EEC) No 2141/70 established by the Member States. The purpose of the regulation was to implement a common policy in fisheries industry<sup>17</sup>.

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<sup>16</sup> *Anglo-Irish Free Trade Agreement of 1965*. Encyclopedia.com. February 2020. [online][date of access: 5<sup>th</sup> of March 2020] Available at: <https://www.encyclopedia.com/international/encyclopedias-almanacs-transcripts-and-maps/anglo-irish-free-trade-agreement-1965>

<sup>17</sup> *Regulation (EEC) N° 2141/70, of the Council of 20 October 1970, laying down a common structural common policy for the fishing industry*. Council of the EEC. 1970. Brussels. [online][date of access: 08 March 2020] Available at: <https://op.europa.eu/en/publication-detail/-/publication/faf8bc88-b4f4-423a-969d-5edd69304bf7/language-en>

In article 101 we point the zones, (both in Ireland and the UK) that have a 12 nautical miles of restriction to develop their fishing rights. In the previous article (Art. 100), we saw that there's a restriction of the fishing areas of 6 nautical miles, but, in the article mentioned previously, this restriction is enlarged to 12 nautical miles in the following areas:

*“3. Ireland:*

- *The north and west coasts, from Lough Foyle to Cork Harbour.*
- *The east coast, from Carlingford Lough to Carnsore Point[...]*

*4. The United Kingdom:*

- *The Shetlands and Orkneys.*
- *The north and the east of Scotland, from Cape Wrath to Berwick.*
- *The north-east of England from Coquet River to Plamborough Head.*
- *The south-west from Lyme Regis to Hartland Point (including twelve nautical miles around Lundy Island).*
- *County Down.”*

So, in that subject, the UK is the one who is in a better situation regarding territory in fishing areas in comparison to Ireland. If we analyse the zones where the Member States could impose their restrictions to the fishing rights of another Member States, the one that has a better circumstance is UK. We require to remember the importance of the fishing rights in the international custom, more specifically for the coastal countries.

The article 104 is also a very interesting one, as we can read that the EEC allow to maintain the existing Trade Laws between Ireland and Northern Ireland. That's something that, if we think about Brexit (and its possible solutions) could be an answer to the problem. A sort of “time travelling” and apply again these laws, that we can imagine that in those times, they were already avoiding the problem that they are having actually in the present days.

But and it is known that, if we analyse the current economy system and the economic situation of both countries, taking laws that were into force decades ago, it is not the solution, because, as we know, the laws have the intention to regulate particular situation in a particular time (although that the perfect situation would be that the circumstance does not change at all and the law would be still existing *ad infinitum*). In the only point that we see that UK is the one that is more affected is in terms of financial contributions (art. 129). We see that Ireland had to contribute a 0.6% when the UK had to contribute a 19%, so, in terms of national economy and national wealth, Europe took into account the situation of both countries.

If we can deduce anything from the brief analysis of the Accession Treaty, we can say that, in an enormous number of trade subjects, UK was the most beneficiary of the regulation in comparison with Ireland. Is proper to consider that is like it is, because, first of all, the economic conditions of both were not similar at all. Ireland was in a

worst economic situation than the UK due to their primary sector-based economy. Even the other conditions, such as the population, have an enormous impact to a country and how it is perceived by the other States. In terms of trade, Ireland had to apply some dispositions that made the country able more easily to place themselves to the same level in economic terms than the UK, or even Denmark.

But, if we examine the simple fact that Ireland had this dispositions in favour, we can come to the conclusion that, this dispositions reflects that Ireland needed more “help” to be at the same level as the rest of the new Member States, and, consequently, as the original Member States.

## **2.2. Relations between both countries during the membership of the UK into the EEC/EU.**

In the terms of their relationship, analysing the historical facts, we can notice that the relations between the UK and Ireland were fragile during a very big time of their membership. Here we will try to see the type of interaction the countries had between them and the end of the armed conflict, and what was the position of the European Union in this matter. Beyond the legal sphere of the accession and the duality of conditions, the relations Ireland- UK are a very important subject to point, because of the armed conflict in Northern Ireland during this membership.

In 1969 (the French veto to the UK's accession to the EEC continued by De Gaulle's Government), the Northern Ireland Civil Rights Association (NICRA) began to claim peacefully in Northern Ireland to stop all the discriminatory laws against the catholic community in the northern Irish territory<sup>18</sup>. Later on, the hard faction of the unionists, began to make violent acts (during the NICRA manifestations) against the protestant sector of the political society. In the earliest 70s, was created inside the Irish Republican Army (IRA) the Provisional Irish Republican Army (PIRA)<sup>19</sup>, the faction that we know as those that carried out the bloodiest acts during the conflict (called *The Troubles*<sup>20</sup>), until the cessation of their activity in 1998, with the signing of the Belfast Agreement also known as *The Good Friday Agreement*<sup>21</sup>.

Between all those moments, the accession of the UK and Ireland into the EEC was a fact, but, the relations between the countries were not good enough. Recall that *The Troubles* began in the late 60's, so, we can say that in total, while the two countries were waiting to join the EEC, and during both membership, the conflict lasted 29 years

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<sup>18</sup> *Civil Rights Activism, the battle of Bogside, and the Arrival of the British Army*. In: *The Troubles*. Jeff Wallenfeldt. Encyclopædia Britannica, inc. London. May 14, 2019 [online][date of access: 12/12/2019] Available at: <https://www.britannica.com/event/The-Troubles-Northern-Ireland-history>

<sup>19</sup> *Irish Republican Army*. Kimberly Cowell-Meyers, Paul Arthur. Encyclopædia Britannica, inc. London. December 16, 2019. [online][date of access: 30/12/2019] Available at: <https://www.britannica.com/topic/Irish-Republican-Army>

<sup>20</sup> WALLENFELDT, JEFF, *op. cit* 1

<sup>21</sup> *The Good Friday Agreement (The Belfast Agreement)*. UK Government, Northern Ireland's Government and Ireland's Government. Belfast. 1998 [online][date of access: 05/02/2020] Available at: <https://www.dfa.ie/media/dfa/alldfawebsitemedia/ourrolesandpolicies/northernireland/good-friday-agreement.pdf>

long. Is necessary to say that, searching for information about the relations between the UK and Ireland, the best source of information that was found were the Irish and English people. The relations between the two countries were harsh, because in the European Parliament (EP) we could see in the same hemicycle, the political parties from the UK, and, the political parties from Ireland. We can think at the same time, that the situation already described was not a situation that could lead to a very cordial plenary session. Nonetheless we have to point that during the IRA's existence, Sinn Féin was the political wing of the paramilitary organisation. Therefore, the fact that a political party were "promoting" into a certain point the violent acts in the territory of a Member State, we cannot think that this situation was the ideal one into the European Parliament in terms of relation between the two countries.

The main aims that the two countries had was, find a peaceful solution to the armed conflict they had in Northern Ireland. This solution was born in 1998, with the signing of The Good Friday Agreement (as the Catholics say) or Belfast Agreement (as the Protestants say). So, although the relations between the two countries were, complicated in the decade of the 90's, with the Agreement they found a middle way.

In terms of the relation, we have to highlight the signature of the GFA. That was the breaking point when the relations between the two countries reached the cordiality point where they are now. But, can the Brexit's process break the Agreement? That Agreement was a very important step for the resolution of the conflict at a political level. And the fact that this Agreement was signed during the membership in the EEC/EU is important, too. The principles of the EU are based in a pacific relation between the Member States and until the withdrawal of the UK from the EU, the relations between both countries were cordial. But since the referendum, the relations between UK and Ireland went every day to a worst situation, due to the possible consequences of the effective Brexit over Ireland. Some political figures from Ireland (as John Bruton, ex-Prime Minister of Ireland in the 90's) think that the Brexit will affect into a mid-long term the Irish economy to a higher level than the British.<sup>22</sup>

### **2.2.1. The position of the EU in the Northern Irish conflict. The PEACE Programme.**

The influence of the European Union in The Troubles became a fact in 1989, 4 years after an International Fund for Ireland (IFI) was created (1985), to obtain international aid to tackle with the Troubles. In 1993, the European Commission made a declaration, in which said that the institution wanted to support the peace process in Northern Ireland. This support (in a more active way) only came with the invitation of the involved governments.

The reaction of the EU was a late one. The Single European Act (SEA) in 1986 and the Maastricht Treaty were the events that marked a breaking point of the EU's reaction to the conflict. With Maastricht, in 1992, was created the EU as we know it

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<sup>22</sup> *El Reino Unido ha puesto a Irlanda en una situación casi imposible*. Carlos Fresneda. El Mundo. 4th December 2017. Derry (Northern Ireland) [online][date of access: 11th March 2020] Available at: <https://www.elmundo.es/internacional/2017/12/04/5a23df91268e3ea1208b45dd.html>

nowadays, and, in order to create a stable political union, we have to imagine that be active in the solution of the problem would be a good step to take for the EU.<sup>23</sup>

The 14<sup>th</sup> December 1993, took place a joint political declaration from the Taoiseach Albert Reynolds and the UK's PM John Major. In this declaration, both leaders pointed that, this declaration established a good peace process framework. Thus declaration came after a very long and complex period of negotiations that started in the late 80's between the Irish and British Governments, the collaboration of the Elected President of the United States of America, Bill Clinton and the population of the Republic and Northern Ireland<sup>24</sup>.

The European Commission, in a communication to the Council and to the Parliament of the 7<sup>th</sup> December 1994, the European Commission proposed a "*specific support programme for Northern Ireland [...]*." This support programme, would be the framework where the peace process in Northern Ireland would lie, because, as we already know, both Ireland and UK were Member States of the EEC/EU since 1973:

*"On the basis of these considerations the Commission proposes that a specific support programme for Northern Ireland be established on the following elements: [...]*

*(ii) The commitment of the two governments to take the best advantage of the new situation is finalising and implementing their operational programmes under the existing Community Initiatives [...]"*<sup>25</sup>

In 1995, was approved the PEACE I programme. Furthermore, this programme was extended with the PEACE II programme (1999-2006) and PEACE III programme. (2007-2013). Nowadays, the fourth PEACE programme (2014-2020) is applying in the territory. The main objectives of this programme are to "*Cohesion between communities involved in the conflict in Northern Ireland and the border counties of Ireland*" and "*Economic and social stability*".<sup>26</sup>

We can see that the EU took (and still have) a very important place in the Peace Process from Northern Ireland. This is a fact that, taking into account both countries were Member States of the EU, the institutional, economic and social support that the

<sup>23</sup> FILIBI LÓPEZ, IGOR. *La Unión Europea como factor de paz*. Agenda Internacional. Año XI, nº 22. 2005. [online] [ date of access: 7<sup>th</sup> April 2020] Available at: <https://dialnet.unirioja.es/servlet/articulo?codigo=6302519>

<sup>24</sup> GONZÁLEZ RUBIO BABILONIA, RAFAEL ENRIQUE. *Análisis del proceso de paz en Irlanda del Norte. Reflexiones sobre su alcance para el abordaje del proceso de paz colombiano*. Universidad Católica de Colombia- Università degli Studi di Salerno. Santa Fe de Bogotá. 2015. [online] [ date of access: 10<sup>th</sup> April 2020] Available at: <https://repository.ucatolica.edu.co/bitstream/10983/2693/1/AN%C3%81LISIS%20DEL%20PROCESO%20DE%20PAZ%20EN%20IRLANDA%20DEL%20NORTE..pdf>

<sup>25</sup> *Communication from the Commission to the Council and the European Parliament. A Special Support Programme for Peace and Reconciliation in Northern Ireland*. Commission of the European Communities. Brussels. 7<sup>th</sup> December 1994. COM (94) 607 final. [ online] [date of access: 10<sup>th</sup> April 2020] Available at: <https://eur-lex.europa.eu/legal-content/EN/TEXT/PDF/?uri=CELEX:51994DC0607&qid=1586607925503&from=EN>

<sup>26</sup> See the European Parliament factsheet about the PEACE programme here: [https://www.europarl.europa.eu/ftu/pdf/en/FTU\\_3.1.9.pdf](https://www.europarl.europa.eu/ftu/pdf/en/FTU_3.1.9.pdf)

Union gave, and still give to the peace process, although it came a little bit late, in a part of the Northern Ireland territory, the programme gives good results.

Unfortunately, at a social level the quarrels between Catholics and Protestants still nowadays present, especially in Northern Ireland. Part of the population of Northern Ireland consider the other part as different to them, and vice versa. Even there is a feeling of fear between the protestant populations of Northern Ireland because, actually in the current days, the population of Catholics has surpassed the population of Protestants for the first time in history. Now, "UK" is the minority in Northern Ireland<sup>27</sup>.

### **2.3. Conclusion to this section.**

The accession of Ireland and the UK in the EEC entailed an improvement of the economic situation of the two countries, an improvement of the trade conditions and also the beginning of the resolution of the armed conflict, that implied the starting of the improvement of the relations of the two countries. In addition, the entrance of both countries to the Community created a benefit to the Original Member States in terms of trade. Two more countries in the EEC implied the expansion of the Customs Union and the Internal Market, the rising of the contributions to the EEC budget and the rising of the own EEC budget. Is Ireland ready for a hard Brexit or the EU must take action to prevent to all costs, a disordered exit of the UK with the intention to protect the GFA, instead of the UK and continue to have a cordial relation with Ireland? The answer would come in the following months, when the new negotiation period begin to take action.

Certainly, if we compare the two States and their economic potential, Ireland would be the most affected of the two countries. Recall that since a long time ago, the relations (political and social) between UK and Ireland were cordial but always walking in thin ice. We cannot believe that the current British attitude (with Boris Johnson as PM) is the best for having a good relations with the Irish government and population. We are describing a situation in which one part of the parts involved does not seem interested in which would be the economic and trade consequences of their exit of the Union.

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<sup>27</sup> *Brexit and Sinn Fein's success boost talk of Irish unification*. The Economist. 13th February 2020. London. [online][date of access: 16th February 2020] Available at: <https://www.economist.com/briefing/2020/02/13/brexit-and-sinn-feins-success-boost-talk-of-irish-unification>



### 3. BREXIT.

Brexit is the word used by the Eurosceptic civil society regarding the exit of UK from the EU, therefore it was created by Peter Wilding (a pro-Europe activist) in 2012<sup>28</sup>. But before the Brexit as we know it, in 1975 (only two years later of the addition to the EEC) there was a referendum celebrated, with the Labour Party in power (Harold Wilson was the Prime Minister). The option to remain won. In this section we are going to analyse briefly what was the route that the UK took before celebrating the referendum, the referendum (and its results), what is the Brexit, the timing, the general and specific points of negotiations (regarding the Irish border) and the *backstop* proposal, as one of the propositions that the EU made to the UK, trying to solve the Irish border issue.

#### 3.1. The path before Brexit's referendum<sup>29</sup>

We are going to study briefly the circumstances that occurred before the Brexit referendum, since we can consider them of great importance because these circumstances established the central points of the Eurosceptic and the political campaign, even the UK demands regarding the eventual remaining of the UK in the EU.

In 2013, David Cameron declared that, if the Conservative Party would win the General Elections in 2015 with absolute majority, he would call the population of the UK to a referendum about their membership in the EU. The Eurosceptic movement in the UK, led by Nigel Farage and the UKIP was increasing their influence into the EP. In 2014, the UKIP won the European elections with a 26'77% of the UK's votes. In 2015, Cameron won the General Elections (with this absolute majority) and, even he was not agree with the Brexit idea, the meetings with the Council of the EU of the time, Donald Tusk, began.<sup>30</sup>

The 10<sup>th</sup> November 2015, David Cameron wrote a letter to Donald Tusk, regarding the 4 spheres that the UK considered proper to reform in the EU: Economic Governance, Competitiveness, Sovereignty and Immigration.<sup>31</sup>

Regarding the first sphere (Economic Governance), the ideas of Cameron lied in the fact that in the EU are "*effectively two sorts of members of the European Union. There are Euro members and non-Euro members*". This statement shows us the duplicity of realities within the European Union and its Member States regarding the currency sphere. As we know, the UK was not a Eurozone Member. One of the most interesting principles that Cameron putted down the letter was: "*Any changes the Eurozone decides to make, such as the creation of a banking union, must be voluntary for non-Euro coun-*

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<sup>28</sup> Origen y evolución de la palabra "Brexit", por el British Council. British Council. 31<sup>st</sup> January 2020. Madrid. [online][date of access: 12<sup>th</sup> March 2020] Available at: <https://www.britishcouncil.es/sobre-nosotros/prensa/origen-evolucion-palabra-brexit>

<sup>29</sup> See the timeline of the negotiations pre-referendum here: <https://www.consilium.europa.eu/es/policies/eu-uk-after-referendum/2016-uk-settlement-process-timeline/>

<sup>30</sup> Cronología de las relaciones del Reino Unido con la Unión Europea. La Vanguardia. 15th June 2016. [online][date of Access: 5th April 2020] Available at: <https://www.lavanguardia.com/politica/20160615/402524795407/cronologia-de-las-relaciones-del-reino-unido-con-la-union-europea.html>

<sup>31</sup> See at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/475679/Donald\\_Tusk\\_letter.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/475679/Donald_Tusk_letter.pdf)

*tries, never compulsory.*”<sup>32</sup>This is a demand that is reasonable. If there is a different reality for some of the members of a club, the club cannot apply the same conditions to all of its members. Regarding the application of such an action as a banking union, this act would be harmful for the States that are not Eurozone members. If you do not have the same currency as the others, the steps that the others could take, would not be an obligation for the ones that do not have the same monetary situation.

In terms of Sovereignty, the most important point that we have noticed is the Cameron’s demand regarding “[...] *end Britain’s obligation to work towards an “ever closer union” as set out in the Treaty.*” This is one of the principal goals of the EU. The fact that this demand, if we study the principal goals of the EU, totally breaks with the objectives of the Union. If one of that objectives, as Jean Claude Juncker (President of the European Commission in those times) said, was creating the EU of Nations, this statement would make unable the EU to create this total political union. The sovereignty has been one of the most controversial assets that the UK had discussed since their accession to the EEC in 1973. This asset is formed by two big scopes: Politic and monetary sovereignty.<sup>33</sup>

Finally, the Immigration sphere. The free movement of people was always a right open to discussion in the UK. And when the Schengen Agreements were negotiated in the late 80’s, UK did not sign them (either Ireland). During the Brexit’s campaign, one of the slogans that the Pro-Brexit parties repeated the most was *Take back control*. This control was regarding the borders. In the letter from Cameron to Tusk one of the arguments that UK puts on the table for being skeptical about the free movement of people is the “*abuse [...]*.” UK was always a country that had their reservations regarding this principle of the EEC/EU. We cannot consider that in terms of immigration the UK had lost their sovereignty at all, because, as we said before, the UK never signed the Schengen Agreements, and the passports controls among all the citizens (even from the EU itself) were applied.<sup>34</sup>

These were the main points that the UK put on a table of negotiation. The reform of this principles, Cameron said that would “*provide a fresh and lasting settlement for our membership of the European Union*”. Recall that one of the pillar rights of the EU is the free movement of people that entered into force with the Maastricht Treaty in 1992. The interest of the UK may not be the interest of the EU as a whole.

The 2<sup>nd</sup> February 2016, Donald Tusk published a proposal for a new regime for the UK. In this date, he gave an answer to the UK’s proposals from the letter of the Prime Minister David Cameron to Tusk.<sup>35</sup>The new agreement that Cameron was seeking for the UK, was dependent on a referendum regarding their membership in the EU.

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<sup>32</sup> See Footnote number 31.

<sup>33</sup> See Footnote number 31.

<sup>34</sup> See Footnote number 31.

<sup>35</sup>The timeline of the negotiations in the previous times to the Brexit Referendum is available here: <https://www.consilium.europa.eu/es/policies/eu-uk-after-referendum/2016-uk-settlement-process-timeline/>



### 3.2. The referendum

In a first place, this referendum was promised to be celebrated in January 2013, but, the reality was that this referendum took place 3 years and a half later, in July 2016. In between those years, the issue was putted in a box and condemned to be part of the political debate sometimes, but not in a very important place in the Westminster schedule. But, the fact was that Cameron, as we saw in the previous section, won the General Election with a majority that he would never expected.<sup>36</sup>

The withdrawal right always existed in the EEC/EU, but we must remember that, before the Lisbon Treaty<sup>37</sup>, there wasn't established any mechanism to leave the Union (but the possibility always existed), so it was included the article 50 that says as follows:

*1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.*

*2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.*

*3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.*

*4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it. A qualified majority shall be defined in accordance with Article 238(3) (b) of the Treaty on the Functioning of the European Union.*

*5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.*

We must think like the writers and the politicians thought at the time of the inclusion of this article. At first, this article was wrote to exist, but no to be invoked or applied in the future. Although we pointed before the lack of withdrawing mechanisms, the fact was, that always was possible to leave the Community, but, the truth is that, anyone thought that one Member State would leave.

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<sup>36</sup> CRAIG, Paul P., Brexit: A Drama in Six Acts (July 11, 2016). European Law Review August 2016; Oxford Legal Studies Research Paper No. 45/2016. [online] [date of access: 19<sup>th</sup> April 2020] Available at SSRN: <https://ssrn.com/abstract=2807975>

<sup>37</sup> *Tratado de Lisboa, por el que se modifica el Tratado de la Unión Europea y el Tratado constitutivo de la Comunidad Europea, firmado en Lisboa el 13 de diciembre de 2007*. Bruselas. 17 de diciembre de 2007. núm. DOUE: 2007/C306/01. ISSN: 1725-244X. [en línea][fecha de acceso: 09/02/2020] Disponible en: <https://eur-lex.europa.eu/legal-content/ES/TXT/?uri=OJ:C:2007:306:TOC>

The UK was, since their entrance into the EEC, the most Eurosceptic country inside the Community. In the UK, there was always a large sector of the population that considered the EEC as an institution that was taking away the British sovereignty (political and economic). Even Margaret Thatcher claimed more sovereignty for the UK in her speech when she said *we want our money back*, in the European Council summit in Dublin, the 29<sup>th</sup> November 1979.<sup>38</sup> After this summit, UK achieved the refund of part of their EU- destined budget in the so called *British check*.

So, the first aim of the inclusion of this article was, for all the Eurosceptic group (where the main political opinion from the UK were included), to maintain the idea that the European Union is only an International Organisation and, put aside the idea of a federalist union between the Member States.<sup>39</sup>

The principal political party that was member of the Leave side were, first of all, UKIP. This was the only political party that was not divided in their position regarding Brexit. Therefore, inside the Leave group, the different visions within the political parties were so evident. In the Conservative Party, we can find some interesting divisions, such as the David Cameron's and Boris Johnson's positions regarding the Brexit. Cameron, although he was who called the people to the ballots, during the campaign was in the *Remain* side. On the contrary, Johnson was always a member of the *Leave* group.

In the Labour Party there were also some divisions, in this case, because of the position's strength of the leaders of the Party. Jeremy Corbyn, who was a defender of the remaining in the EU, never made a string declaration against the withdrawal from the Union, as some of the members of the Labour Party said.<sup>40</sup>

Later on, in the 23<sup>rd</sup> of June 2016 (after a lot of negotiations between the European institutions and the UK's government), a second referendum was celebrated in UK regarding the same question. That time, the option to leave won.

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<sup>38</sup> BREXIT: *We want our money back!* Margaret Thatcher already warned EU exactly 40 years ago!. Productiehuis EU. 29th November 2019 [online] [date of access: 12th March 2020] Available at: <https://www.youtube.com/watch?v=rNLVeAQvzn8>

<sup>39</sup> GALLARDO VALERIO, A. *El derecho de retirada en la Unión Europea: teoría y puesta en práctica con el Brexit*. Universidad de la Rioja. 2018. [online] [date of Access: 19th April 2020]. Available at: [https://biblioteca.unirioja.es/tfe\\_e/TFE004134.pdf](https://biblioteca.unirioja.es/tfe_e/TFE004134.pdf)

<sup>40</sup> CASTAÑO, PABLO. *El Brexit divide a los partidos británicos*. 24th December 2018. El Cuarto Poder. [online] [ date of Access: 13th April 2020] Available at: <https://www.cuartopoder.es/internacional/2018/12/24/el-brexit-divide-a-los-partidos-britanicos/>

<b>TERRITORY</b>	<b>LEAVE</b>	<b>REMAIN</b>
<b>UNITED KINGDOM</b>	<b>51.9%</b>	48.1%
<b>ENGLAND</b>	<b>53.4%</b>	46.6%
<b>NORTHERN IRELAND</b>	44.2%	<b>55.8%</b>
<b>SCOTLAND</b>	38%	<b>62%</b>
<b>WALES</b>	<b>52.5%</b>	47.5%

Source: Own elaboration using the data in the EL MUNDO website<sup>41</sup>.

As we can see in the previous table, the total results of the referendum on Brexit in the whole UK, the victory of the LEAVE group was not as wide as they would prefer, but the fact is that this option won the referendum. For that reason, months later, some of the politicians and MP's that voted for REMAIN demanded a second referendum on the membership in the EU.

The Prime Minister of the time, Theresa May invoked the article 50 after knowing the results of the referendum (we must remember that David Cameron, the predecessor of May was who called to the population to the referendum) the 29<sup>th</sup> March 2017 via letter to Donald Tusk. It was in that time when the second period of negotiations began. The Brexit meetings began between the UK's government (led by PM May and her Secretary on Brexit, David Davis), and the European Commission (lead by Michel Barnier).<sup>42</sup>

In the current Brexit, there were two periods of negotiations: The first one, began the 25<sup>th</sup> June 2015 with a meeting between David Cameron (UK's PM) and Donald

<sup>41</sup> <https://www.elmundo.es/internacional/2016/06/24/576ce7d5e5fdeaf4638b4632.html>

<sup>42</sup> *Letter from UK's PM Theresa May to Donald Tusk*. 29<sup>th</sup> March 2017. London. [online] [date of access: 16<sup>th</sup> February 2020] Available at: <http://data.consilium.europa.eu/doc/document/XT-20001-2017-INIT/en/pdf>

Tusk. The purpose of that meeting was to establish the guidelines to make effective a referendum in UK relating to the EU membership. The Brexit process in its first phase of negotiations was a process that included the participation of the great European institutions in different stages and positions. It was explained in general terms by an infographic of the Council of the European Union of the year 2017.

### 3.3. Negotiations' timing.

The procedure begins with the invocation of the aforementioned article 50 to the Council. Subsequently, the Council publishes the guidelines that the group of EU negotiators must follow in the course of them. The Council, authorizing the opening of the negotiations adopts the lines of action of the body designated to carry out the negotiation tasks which in the case of Brexit, the reins were taken by the European Commission with Michel Barnier as head of the community negotiations team.



Source: European Council

In the framework of the process of negotiations between the two teams, both the Council and EP are present in the background. Both the Council and EP offer guidance and various types of contribution, such as taking more measures to achieve the objectives of the negotiation.



Source: European Council

In the British negotiating team, the British Parliament is the body that gives final approval to the agreements reached with the community team. Recall that if there have been so many extensions to the application of Article 50 of the Lisbon Treaty, it has been due to the reluctance of the House of Commons that it has blatantly rejected certain agreements that the Theresa May government managed to reach with the Michel Barnier team. One such agreement that was rejected by British MPs was the so-called backstop agreement, which is explained in the next sections of this chapter.

By the time the negotiations are over, the exit agreement must be ratified in two instances: The community instance in the EP and the British instance in the House of Commons.

The two chambers must approve the agreement, otherwise there could be two options: the first, which was the one that was happening, would be the extension or extension of the application of article 50; and the second, that there be the possibility of a Brexit without a framework agreement on which to work.<sup>43</sup> The 19<sup>th</sup> of June 2017, the negotiations between the UK and the EU Commission started in its first round.

### **3.4. General Points of negotiation in Brexit**

In the letter sent by May to Tusk (see footnote number 42), the PM established the points that the UK proposed for the discussions between the parts involved, but we are going to talk about 3 out of the 6 points of the letter. The first one, talks about the UK-EU cooperation in terms of trade. In this part, the UK is aware that the British companies that will trade with EU companies will have to be aligned with some legislation that are no more applying to them as a Member State. In this case, this idea can be related to the sixth point of the letter that talks about a Free Trade Agreement between the UK and the European Union. This is a point that it would be a good one to develop. We cannot consider effective to subdue the UK to a regulations that *a priori* are only applicable to the Member States, therefore, the fact the UK puts on the table the option of a Free Trade Agreement with the EU is a good perspective to preserve the good relations among the involved parts.

The other point we have to consider is the fifth point of the May's letter. The unique relationship between UK and the Republic of Ireland. In the next section we are going to talk deeply about this subject but, as an introduction, the main matters that Westminster putted on the table regarding this sphere were the avoidance of a hard border between Ireland and Northern Ireland, the maintenance of the Common Travel Area (CTA), and above all this points, the preservation of the Peace process in the territory and the protection of the Good Friday Agreement.

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<sup>43</sup> *Infografía. Proceso del Brexit*. Consejo de la Unión Europea. 2017. Bruselas. [online][date of access: 15<sup>th</sup> March 2020] Available at: <https://www.consilium.europa.eu/es/infographics/brexit-process/>

The main points to negotiate between the UK and the European Union were agreed by the involved parts in it, and they coincide if we take the letter from PM May and the points that Michel Barnier exposed in his speech after the first round of negotiations:<sup>44</sup>

“- *EU citizens rights.*

- *Single financial settlement.*
- *Irish Border.*

- *Another issues*<sup>45</sup>. ”

As Barnier said in his speech, the main goal of Europe is “*to make sure that the withdrawal of the UK happens in an orderly manner*”, so, the structure of negotiations were, 1 week of negotiation each month. In total, there were 7 round of negotiations, and, between them, we can point some interesting meetings and agreements, as such as the meeting between Donald Tusk and the Irish Prime Minister (*Taoiseach*) Leo Varadkar, in December 2017 and the publication of the first Draft of Withdrawal Agreement in February 2018.<sup>46</sup>

That rounds were related to the first phase of negotiations, the phase that would establish “the game rules” between the EU and the UK during the negotiations and the points that would need to be developed *a posteriori* in the Draft Agreement.

Two of the most interesting negotiation round are the fourth and the fifth. In this two rounds, we can point that the most important matter of discussion was, inevitably, the Irish border. Why is the Irish border the most controversial point of the Brexit negotiations list? The answer is simple. The establishment of a physical border between these two jurisdictions is something that is obvious that, with Brexit will occur but, even the UK will be categorized as a third State, they do not want to happen<sup>47</sup>. So, the main issue here is, find the perfect solution to be applied in a long-term period. And, I consider that part of the best solution is to maintain the CTA.

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<sup>44</sup> *Speech by Michel Barnier, the European Commission's Chief Negotiator, following the first round of Article 50 negotiations with the UK.* European Commission. Brussels. 19 June 2017. [online] [date of access: 01/02/2020] Available at: [https://ec.europa.eu/commission/presscorner/detail/en/SPEECH\\_17\\_1704](https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_17_1704)

<sup>45</sup> This issues were, mostly, the relocation of the EU agencies established in UK, the European Medicines Agency (now in Amsterdam) and the European Banking Authority (now its Headquarters are located in Paris)

<sup>46</sup> The timeline of the Brexit negotiations is available at: <https://www.consilium.europa.eu/en/policies/eu-uk-after-referendum/>

<sup>47</sup> I understand that, the main thought of "no border" between a EU Member State and a third State is something that goes against logic, unless you have an agreement, as the CTA.



### 3.5. Specific points of negotiation regarding Ireland.

Besides the general points of negotiation regarding Brexit as a whole matter, in the Irish issue, they had obviously, their own points of negotiation. This matters of negotiation were all based in protecting the GFA, and, to avoid the establishment of a physical border, as well as preserving the CTA. This frontier is, in the Irish and Northern Irish mentality, segregation and differentiation between families, and obviously, differences in the opportunities.

So, in the fourth and fifth round of negotiation<sup>48</sup>, the hot point was Ireland. The 28<sup>th</sup> of September took place the fourth negotiations round, but, the guidelines<sup>49</sup> for that meeting, were made the 20<sup>th</sup> of September. The main points of the meeting were, first of all, the protection of the GFA and the Peace Process, and secondly, the CTA<sup>50</sup>.

That arrangement has its base in the Good Friday Agreement and the historical background between both States. We are going to make a brief excursus and talk a little bit about the CTA. This is a long-standing arrangement between Ireland and the UK that allows both citizenships (Irish and British) to move without limitations between the two States and that arrangement is recognized by the EU legislation. The basic principle on which this Agreement lies is that both nationalities (Irish and British) have the same opportunities in terms of settlement and job in both territories. The origins of this arrangement between UK and Ireland are in 1922, when the Free Irish State was created, but during the years (1949, 1958, 2008) this arrangement was still operating in the territory of Ireland and UK. The principal rights that the Irish and UK citizens have regarding this arrangement are, the right to access to education, jobs, healthcare and settlement.

If we analyse the points inside the GFA section in the Guiding principles, we can assume that, even all of them are important, the ones that are the pillars of the negotiation are “*the avoidance of a hard border; North-South Cooperation; Rights, Safeguards and Equality of Opportunities; Citizenship rights*”, as them were the pillars of the Agreement in 1998.

The round did not make any remarkable progress, as the previous and the next, the fifth, as we see that, as Barnier said in his speech after the fifth meeting, they didn't take “*great steps forward*”, but, in the area that we are interested, the few steps that they took were about the continuation of the CTA, the North-South cooperation and the prin-

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<sup>48</sup> Press statement by Michel Barnier following the fifth round of Article 50 negotiations with the United Kingdom. European Commission. 12th October 2017. Brussels. [online][date of access: 6th of February 2020] Available at: [https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT\\_17\\_3921](https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_17_3921)

<sup>49</sup> Guiding principles for the Dialogue on Ireland/Northern Ireland. European Commission. Brussels. 21 September 2017. [on line][date of access: 01/02/2020] Available at: [https://ec.europa.eu/commission/sites/beta-political/files/dialogue\\_ie-ni.pdf](https://ec.europa.eu/commission/sites/beta-political/files/dialogue_ie-ni.pdf)

<sup>50</sup> IRELAND'S GOVERNMENT. Common Travel Area. Information Note from Ireland to the Article 50 Working Group.. 7 September 2017. Dublin. [online][date of access: 06/02/2020] Available at: <https://merriion-street.ie/en/EU-UK/>

ciples included in the guidelines published in September before the fourth round of negotiations.<sup>51</sup>

In March, 19<sup>th</sup> 2018, there was published a Draft Agreement on the withdrawal of the UK of Great Britain and Northern Ireland from the European Union and the EU-RATOM. In fact, it was the first Draft Agreement published after the seven negotiation rounds. That Draft is related to the Joint Report<sup>52</sup> published the 8<sup>th</sup> of December 2017, because, in this Report, is where we see, without see it expressly, the idea of “backstop”.

Specifically, in its paragraphs 49, 50 and 51 of the Joint Report (but mostly in paragraph 49), we see that the option of maintaining Northern Ireland in the Internal Market and Customs Union is on the table, always with the GFA as a legal base. Literally we can read in paragraph 49:

*“[...]In the absence of agreed solutions, the United Kingdom will maintain full alignment with those rules of the Internal Market and the Customs Union which, now or in the future, support North-South cooperation, the all-island economy and the protection of the 1998 Agreement”.*

That was, at the time, one of the most controversial point of the negotiations. Although the EU Commission’s team and the UK Government team agreed in the backstop as a *ultima ratio*, and this spirit was in the Protocol on Ireland/Northern Ireland, in the House of Commons and the Northern Ireland Assembly, not everybody agreed in that idea.

### 3.6. The “Backstop” proposal

The justification for the analysis of this topic is the importance of the consequences that would result from the application of the backstop. We are talking about a serious proposal that was given by the negotiating teams. We are not only talking about consequences at the legal, economic and commercial level, but consequences at the social level. We have to remember the political-social conflict that has existed for decades (although now in a stand-by situation) on the island.

We can understand that the backstop proposal is a proposal to keep the GFA intact. It is the cornerstone of the current relations between Ireland, Northern Ireland and

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<sup>51</sup> That situation led to Mr. Barnier to discard to recommend to the European Council the starting of the negotiation on future relations.

<sup>52</sup> *Joint Report from the negotiators of the European Union and the United Kingdom Government on progress during the phase 1 of negotiations under article 50 TEU on the United Kingdom’s orderly withdrawal from the European Union.* European Commission. Brussels. 8<sup>th</sup> December 2017. [online] [date of access: 4 February 2020] Available at: [https://ec.europa.eu/commission/publications/joint-report-negotiators-european-union-and-united-kingdom-government-progress-during-phase-1-negotiations-under-article-50-teu-united-kingdoms-orderly-withdrawal-european-union\\_en](https://ec.europa.eu/commission/publications/joint-report-negotiators-european-union-and-united-kingdom-government-progress-during-phase-1-negotiations-under-article-50-teu-united-kingdoms-orderly-withdrawal-european-union_en)



the UK, and from the beginning of the negotiations and Brexit per se, they always wanted to protect the agreement at all costs.

### **3.6.1. Who proposed the backstop and definition.**

This option was proposed by the EU Commission team and the UK's Government team, in the meetings that made the Joint Report, and after a letter that the PM of that time, Theresa May, sent to Donald Tusk, the 19<sup>th</sup> March 2018<sup>53</sup>.

What does it mean? Or if we want to reformulate the question: What does the backstop mean? The backstop mean that, unless the negotiators find a useful agreement for Northern Ireland and Ireland, or during the negotiations after the effective UK's withdraw from the EU, Northern Ireland would remain part of the Internal Market and Customs Union and it will be a beneficiary of European funds and Programmes as Common Agricultural Policy (CAP).<sup>54</sup>

The 11<sup>th</sup> June 2018, was published an infographic<sup>55</sup>, were the backstop proposal was exposed. In that document we can see, how the backstop would work.

### **3.6.2. Implications of the backstop for Northern Ireland.**

First of all, recall that, this proposal, was created to protect the GFA, of the principal point of negotiation of the Irish issue.

Now, to understand what would be the implications of the backstop, is proper to analyse briefly, regarding the infographic previously mentioned, how it would work. As the infographic tells us, the backstop would imply an open border between the two Irelands, and, with this open border, Northern Ireland (and the whole UK) would be part of the Internal Market and:

- *“EU tariffs and rules of origin apply to non-EU goods.*
- *EU VAT and excise rules.*
- *EU product safety and quality standards (e.g. food. chemicals and consumer goods).*
- *EU rules on animal health and welfare.”*

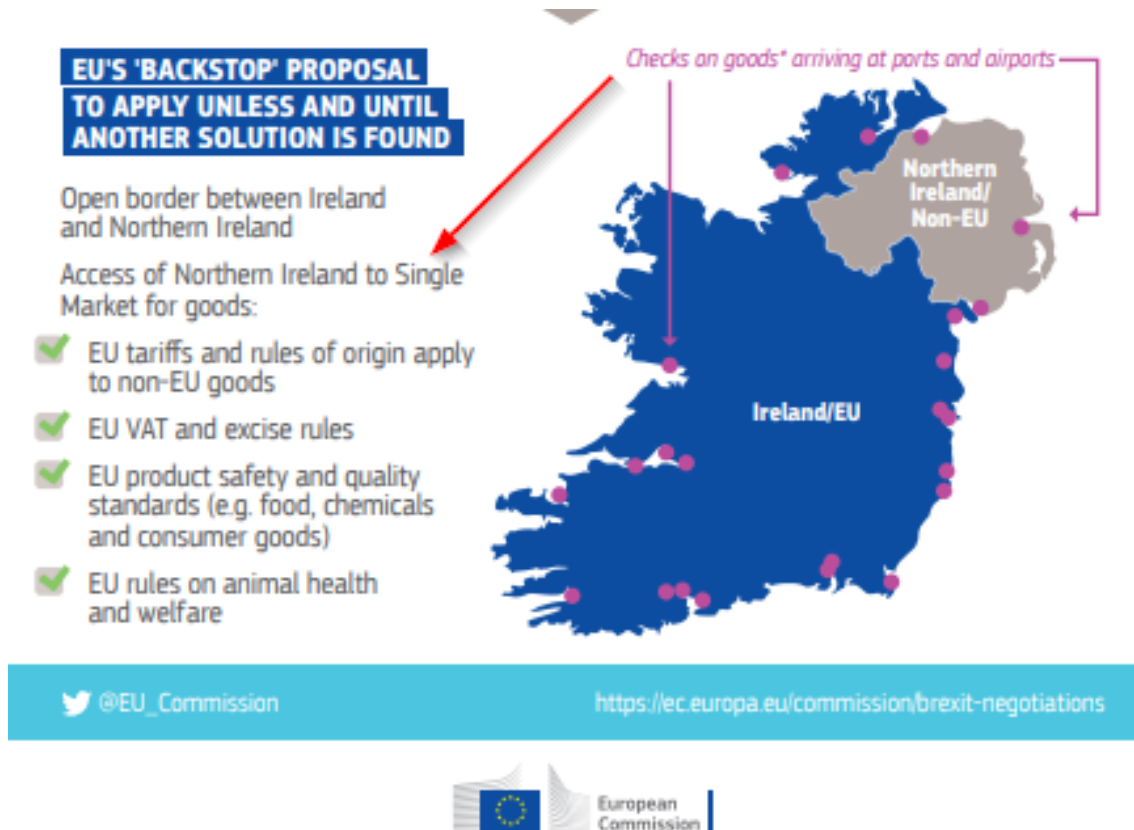
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<sup>53</sup> Available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/691625/PM\\_Pres\\_Tusk\\_19.03.2018\\_001.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/691625/PM_Pres_Tusk_19.03.2018_001.pdf)

<sup>54</sup> McMAHON J.A. *Avoiding the Backstop Solution: Northern Ireland and the EU post-Brexit.* University College Dublin. UCD Working Papers in Law, Criminology & Socio-Legal Studies. Research Paper No.05/2018. [online][date of access: 20 November 2019] Available at: <https://ssrn.com/abstract=3155145>

<sup>55</sup> *Infographic on the EU's "backstop" proposal.* European Commission. 11 June 2018. [online][date of access: 20 December 2019] Available at: [https://ec.europa.eu/commission/sites/beta-political/files/infographic\\_on\\_the\\_eu\\_backstop\\_proposal.pdf](https://ec.europa.eu/commission/sites/beta-political/files/infographic_on_the_eu_backstop_proposal.pdf)

In terms of checks on the goods, the only checks that would exist at ports, like Galway (EU), Dublin (EU), Belfast (UK), Cork (EU), Londonderry/Derry (UK); and airports.



Source: European Commission (EU)

The main implication that I can draw from this proposal is, first of all, the ineffective departure from the whole of the UK.

Northern Ireland then, would it have two types of legislation to follow and comply with (The EU legislation and the UK's)? The backstop proposal at no time speaks of duplication of legislation, but it is something that I find important to highlight. The viability of an agreement is that all the points are developed and that there are no legal loopholes that could lead to misapplication or that the agreement is left on paper.

It is evident that the situation of avoiding the hard border between the two Irelands would be covered by the backstop, but, as the infographic explains, this would be in force in the event that a feasible solution is not found between the parties involved or if it is being negotiating at the time of application. As it was mentioned before, the backstop would be an option that would be effective after an agreement. What does it mean? The fact that the backstop would be effective with an agreement means that, for example, if Northern Ireland would like to finish the agreement, the involved parts (UK,

Ireland and the EU) would must negotiate the withdrawal agreement on the backstop of Northern Ireland.

### **3.6.3. *Viability of the proposal.***

As it was said previously, the main implication of this proposal is the problem of the ineffective withdrawal of the UK from the EU and eventually, the duplicity of legal systems applicable to Northern Ireland. For that reason, is correct to talk about the viability of this proposal and what are some of the proposals from the Political Parties in Northern Ireland. Analysing the infographic of the European Commission, is not very realistic to think that the backstop would be viable because, first of all, we cannot believe that the parts involved would like to negotiate again a withdrawal of an agreement when actually the first withdraw is not fully effective, so we must agree with the opinions of the slanderers of the backstop.

In Westminster Palace, a big number of *Tories* (Conservative Party) didn't like the idea of maintaining Northern Ireland under the Internal Market and Customs Union Laws while the rest of the UK was leaving the EU. They felt that this situation could give an image of the UK never leaving the EU at all.

Either in Northern Ireland the idea was good (at least for some of the political parties). The DUP (Democratic Unionist Party, pro-UK) thought like the Conservatives aforementioned. They said that, if the backstop option would enter into force, Northern Ireland would be under European regulations, and that would be something in favour of the reunification of the Island of Ireland, and, also, the UK would have to agree with the EU the end of the backstop with more rounds of negotiation<sup>56</sup>.

In the other hand, the other political parties in Northern Ireland, as Sinn Fein, Social Democratic and Labour Party, Alliance Party and the Ulster Unionist Party, they gave their visions and positions about a Special Status for Northern Ireland.

Sinn Fein, for example, talks about remain as part of the internal market, the Union customs and be part of the funding programmes and part of the European Parliament as part of the Irish delegation, and obviously, the CTA should be maintained<sup>57</sup>. We must recall that Sinn Fein is the party that has an ambition of a reunification of Ireland<sup>58</sup>.

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<sup>56</sup> *Brexit: 5 preguntas para entender por qué la frontera de Irlanda es crucial en el acuerdo entre la UE y UK*. BBC News. London. 11 December 2018. [online] [date of access: 01 February 2020] Available at: <https://www.bbc.com/mundo/noticias-internacional-46513736>

<sup>57</sup> SINN FEINN. *The Case for the North to Achieve Special Status within the EU..* Available at: [https://www.sinnfein.ie/files/2016/The\\_Case\\_For\\_The\\_North\\_To\\_Achieve\\_Special\\_Designated\\_Status\\_With\\_in\\_The\\_EU](https://www.sinnfein.ie/files/2016/The_Case_For_The_North_To_Achieve_Special_Designated_Status_With_in_The_EU)

<sup>58</sup> And with the astonishing results in the latest polls in Ireland, the idea of a reunified Ireland is again on the table and it is part of the political debate.

The Social Democratic and Labour Party's position consists in maintaining the membership of the Internal Market and continuing to be beneficiary of EU funding programmes<sup>59</sup>. The Alliance Party agrees on the ideas from Sinn Féin and Labour Party, but adding the collaboration of the UK's Government in Non-EU Foreign and Defence Policy<sup>60</sup>. The Ulster Unionist Party<sup>61</sup>, although is a pro-UK party, in their manifesto we can observe that the free access to the EU's Single Market for Northern Ireland (maintaining that territory in the Single Market) that could be seen as a possibility for the UK to be a *de facto* member of the Single Market, without necessity to be a *de iure* member.

This proposal does not help to protect the GFA and the Peace Process. Probably, a part of the population of Northern Ireland would feel isolated from the rest of the UK, and, with the delicate background that existed in the territory of Northern Ireland, the proposal would re-establish and reopen old wounds that, in this moment, are still healing, because the backstop is not only about trade, customs or legal systems. The backstop has a wider vision, reaching the social and cultural spectre of the population.

In the end, the backstop proposal was rejected in the House of Commons.

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<sup>59</sup> SDLP. *Securing our Future in Europe*.. Available at: [https://www.sdlp.ie/site/assets/files/43037/sdlp\\_-\\_securing\\_our\\_future\\_in\\_europe.pdf](https://www.sdlp.ie/site/assets/files/43037/sdlp_-_securing_our_future_in_europe.pdf)

<sup>60</sup> ALLIANCE PARTY. *How to mitigate the impact of Brexit on Northern Ireland*.. Available at: <https://d3n8a8pro7vbm.cloudfront.net/allianceparty/pages/3656/attachments/original/1549570675/how-to-mitigate-the-impact-of-brexit-on-northern-ireland.pdf?1549570675>

<sup>61</sup> ULSTER UNIONIST PARTY. *A vision for Northern Ireland outside the EU*. Available at: <https://uup.org/our-vision/policies#a-vision-for-northern-ireland-outside-the-eu>

#### **4. THE GIANTS CAUSEWAY. THE SITUATION OF THE IRISH BORDER AFTER THE BREXIT.**

In this final section, we are going to analyse the current situation after the withdrawal of the UK from the European Union. This is the point where we are going to analyse the Implementation period, and several proposals from experts to solve the situation that could lead a hard Brexit in the Irish border. The first one, would be joining the European Economic Area (EEA); the second one, the creation of a Special Protocol on Trade for only Northern Ireland, as the one that was created for West and East Germany during the Cold War; the third one, the creation of a Common Custom Union between the two parts of the island and the fourth would be the reunification of the island. Also we are going to explain an experiment made on our own, as a possible solution to the issue.

This section is important, since it materializes in what many in the EU and in London itself thought would not come. The effective departure of the UK from the European Union. Everything seemed to indicate that there would be more extensions of Article 50 of the Treaty on the European Union (TEU), but with the arrival of Boris Johnson as Prime Minister of United Kingdom, the process began to speed up (so much so that even Johnson threatened with Brexit without an agreement, since his main goal as PM was the effective exit of the UK from the EU).

The 20<sup>th</sup> December 2020, the House of Commons had approved the withdrawal agreement. Accordingly to this fact, the European Union was, the next to ratify the Agreement in the EP.<sup>62</sup> The 24<sup>th</sup> January 2020, the EU signed the Withdrawal Agreement, and the 29<sup>th</sup> January 2020, both the EP and the Council ratified the Agreement and the only left was to wait until the day of the effective withdrawal of the UK from the EU. <sup>63</sup> The 31<sup>st</sup> January 2020, the UK left the EU. The 1<sup>st</sup> February 2020 began what is called the “transition period”. In that period, both parts of the negotiation, should make an agreement on how the future relations between the two entities would/will be.<sup>64</sup>

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<sup>62</sup> *El Parlamento británico aprueba el acuerdo de retirada de Boris Johnson*. La Vanguardia. Londres. [online][date of Access: 17th March 2020] Available at: <https://www.lavanguardia.com/internacional/20191220/472369445367/parlamento-britanico-aprueba-acuerdo-retirada-boris-johnson-brexit-reino-unido.html>

<sup>63</sup> The Brexit's timeline is available at: <https://www.consilium.europa.eu/es/policies/eu-uk-after-referendum/>

<sup>64</sup> EDGINGTON, TOM. *Brexit: What is the transition period?*. BBC News Analysis. 31<sup>st</sup> January 2020. BBC News. [online][date of access: 15<sup>th</sup> March 2020] available at: <https://www.bbc.com/news/uk-politics-50838994>

In March 2020, the new period of negotiations have started<sup>65</sup>. The last day of this phase is the 31<sup>st</sup> December 2020. There are two options for this period: The end of the relation with a full regulation of the system, or, on the other hand, the “hard Brexit”. This option implies the absence of any legal regulation of the future relations between the EU and the UK of Great Britain and Northern Ireland.

#### 4.1. The Implementation period.

This transitional period entails that during the following months the UK, in order to adapt progressively to the new situation, the European legal system is still in force in the British territory, the European citizens that are currently living in the UK would maintain their “European citizenship” rights and they will have the advantage of no requirements for the residence authorisations.<sup>66</sup>

Another consequence of this period is the competence of the European Court of Justice (ECJ) in the issues that the UK had submitted to the Court before Brexit, and also in the ones that it could be submitted during this period.<sup>67</sup> This period of time is so important for the negotiations, because this negotiations would fix the path for the EU and the UK to follow during the future relations between them.

That phase is necessary because, it was simply not feasible for the UK to leave the European Union without a safety net. The mere existence of the community acquis was sufficient to establish a regulated and orderly exit in any way. One of the most important assets the negotiation teams have to tackle is what has to be done in this transitional period. The principal goal to achieve is a trade agreement.

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<sup>65</sup> In this days, due to the Covid-19 crisis, the negotiations are suspended *sine die*. We don't know if the pandemic situation will affect to the course of the transitional period. I think it would be favourable to the negotiation to implement as many extensions as necessary to create a beneficial agreement to both the European Union and the United Kingdom.

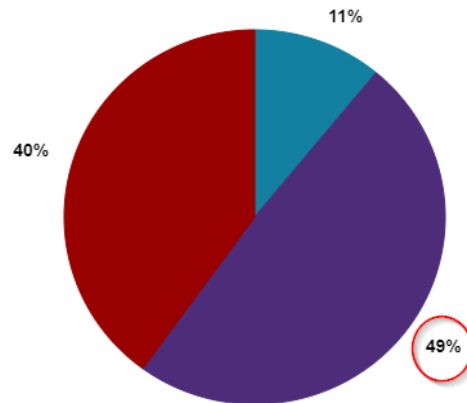
<sup>66</sup> EDGINGTON, TOM. *op. cit* 62.

<sup>67</sup> EDGINGTON, TOM. *op. cit* 62.

### Where does the UK trade?

% of total UK trade in 2018

■ Countries with EU trade agreements ■ The EU ■ Rest of the world



Source: Department for International Trade

BBC

Source: BBC

As we can see in this graphic, the vast majority of the UK trade goes to the EU, but, it is not the only asset the negotiation teams will have to address. There are a group of matters that both the EU and the UK will have to deal with, such as: *“Law enforcement, data sharing and security; aviation standards and safety; access to fishing waters; supplies of electricity and gas and Licensing and regulation of medicines.”*<sup>68</sup>

#### 4.1.1. Finishing the Implementation period.

This situation, only can end in three ways:

1. The involved parts can achieve a trade agreement and it enters into force as soon as the transition period ends. This situation is the most desirable, because, it means that the negotiation teams had accomplished all their duties, and the relationship between the UK and the EU will be stable and profitable to both of them.<sup>69</sup>
2. The transition period end with no-deal between the parts. Obviously, we can understand that this situation is the diametrically opposite to the first one. If we said before that the first aim of the negotiations in the transitional period is to create a trade agreement between UK and the EU, we have to consider this situation as discarded.<sup>70</sup>

<sup>68</sup> EDGINGTON, TOM. *op. cit* 62.

<sup>69</sup> EDGINGTON, TOM. *op. cit* 62.

<sup>70</sup> EDGINGTON, TOM, *op cit* 62.

3. The transition period ends and the trade agreement is not finished yet. The principal consequence of this situation would be that the current UK's PM would agree with the EU an extension of the negotiations on the trade agreement. That circumstance is something that can happen, because, if we look back at the Article 50 negotiations, we can assume that an extension of the agreement is something realistic.<sup>71</sup>

#### **4.1.2. Form of the transitional period's negotiations.**

This transition period must have a legal basis. And the question here is, what form would take this transitional agreement and, in the end, which form would have the final agreement?

The situation in which this transition leaves us and in which way it should be faced, is obviously complicated. Brexit itself is complicated. Let us remember that it is a totally new and unprecedented situation in the history of the European project. In a situation like this, we must understand that legal certainty is the fundamental pillar of any negotiation, and that legal certainty, we also understand that it must lie in the form that negotiations take and the instrument that will be used.

In a paper written by Armstrong, Bell, Daly and Elliott, we are offered three of the options that were considered in October 2017 to face the transition period.<sup>72</sup> The first one of all could have been an extension of Article 50 TEU, thus pushing the date of Brexit out (in fact, there was more than one extension).<sup>73</sup> The second one would be the creation of an "Analogy" of the Accession Treaty (using Part 4 of the Treaty of Accession of the UK, Ireland and Denmark to the EEC in 1973).<sup>74</sup> The third one would be an association agreement. Taking into account that from the beginning in the negotiating teams, the thought that the relationship between the European Union and the UK was going to be (and thus the teams would work) close and profitable, we should understand that, in principle, this it would be the instrument that should be used to regulate future relations between the parties.<sup>75</sup>

As it is said before, the implementation of the transition period is a process that must be addressed with the use of instruments that provide the circumstance with the maximum possible legal security.

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<sup>71</sup> EDGINGTON, TOM, *op cit* 62.

<sup>72</sup> ARMSTRONG, K and BELL, J. S. and DALY, P and ELLIOTT, M.C., *Implementing Transition: How Would it Work?* (October 13, 2017). University of Cambridge Faculty of Law Research Paper No. 57/2017.[online][date of access: 20<sup>th</sup> March 2020] Available at SSRN: <https://ssrn.com/abstract=3052328>

<sup>73</sup> ARMSTRONG, K and BELL, J. S. and DALY, P and ELLIOTT, M.C, *op cit*. 70

<sup>74</sup> ARMSTRONG, K and BELL, J. S. and DALY, P and ELLIOTT, M.C, *op cit*. 70

<sup>75</sup> ARMSTRONG, K and BELL, J. S. and DALY, P and ELLIOTT, M.C, *op cit*. 70



Obviously, this transition, at the moment when the situation returns to normal (see footnote 65), will have to be addressed with new action times and new deadlines. It is manifest the impossibility that on December 31, 2020 there is an agreement signed to establish the regulation of future relations between the UK and the EU. Thus for now, the transition period is in a necessary stand-by.

#### **4.2. Possible solutions to the Irish border issue.**

The Irish border issue, is not an easy one to solve. And probably a solution is found but it should be adapted according to the times. In this part of the paper is where we will have on the table several solutions to the issue, and where we should find the answer to the first question we had asked ourselves in the introduction.

The solutions that can be proposed must go through an agreement of all the parties, including the EU Member States separately, since they too will have to adapt to a new time and new circumstances regarding the UK. If a long-term solution is found for the Irish border, it would be a triumph for the two negotiating parties, and that would imply that the only land carrier between the EU and the UK would be well regulated, without any crack. It is evident that the solution must protect the GFA at all costs, since it is the convergent point where all the parties involved in the previous armed conflict, plus the EU, feel comfortable and where relations between the Republic of Ireland and the UK found their point of understanding.

The possible solutions that we will try to analyse are, on the one hand doctrinal or political and finally, an own option: The accession of the UK or even the accession of Northern Ireland to the EEA; the creation of a special Protocol in trade, similar to the one created for West Germany just before the reunification of the German country in 1990; the possible reunification of the Island of Ireland; A Common No-Custom Area for only the Island of Ireland, and finally, the creation of an experiment of our own, titled *The inverse contingency plan and specific legislation. The Trade Weigh Index*.

Remember that, even the solutions that we will analyse hereunder would affect to UK as a whole, the main goal that we have to achieve is to look at the solutions from the Northern Ireland (and Ireland) point of view and how this proposals would affect the Irish border.

Therefore, the solutions that will be analysed or put on the negotiating table once they are resumed, should be aimed, not only to protect what was agreed in the Good Friday Agreements / Belfast Agreement, but should also be directed to benefit Northern Ireland to a greater extent respectively from the other nations that make up the UK, and also to create a certain beneficial situation for the Republic of Ireland and respect their situation in the European Union.

#### 4.2.1. *Joining the EEA (European Economic Area)*

The EEA (European Economic Area), is an Agreement that construct a group between the Member States of the European Union and three out of four States of the EFTA, except Switzerland. This Agreement entered into force on 1<sup>st</sup> January 1994 and the principal goal that wants to achieve is to create a stringer trade and economic relation between the States, relating with the 4 liberties from the EU: Free movement of goods, services, capital and people.<sup>76</sup>

In a paper written by Doherty, McCrudden, Temple Lang, McGowan, Phinnemore and Schiek, in April 2017, they did analyse briefly this proposal.<sup>77</sup>

Indeed, the main matter we have to take into account is which would be the implications to Northern Ireland to join (with the rest of the UK) the EEA. First of all, one of the consequences of joining the EEA would be that Northern Ireland would be outside the Customs Union and the ECJ would not have any jurisdiction in the territory, something that we can consider as a great change in the legal framework.<sup>78</sup>

The option to enter in the EEA would maintain the *status quo*, retaining some existing arrangements related to the free movement of goods, capital, services and people of the EU membership period, and some levels of market integration, but not a complete integration, because Northern Ireland would not be a Member State of the EU.<sup>79</sup>

One of the most important items about being an EEA member, regarding Northern Ireland and the EU benefits is in fact, that Northern Ireland would not be a beneficiary of the CAP and the Common Fisheries Policy (CFP). The importance of this consequence of withdrawing from the EU lies in the big significance that the Agriculture and the Fisheries have in the Northern Irish society. Regarding Brexit, if we have to compare which of the 3 territories part of the UK would be the most affected by the withdraw, Northern Ireland would be the most affected, without any doubt.

The European Union, after the signature of the GFA, gave to Northern Ireland a vast support in terms of agricultural subsidies. In 2016, Northern Ireland received

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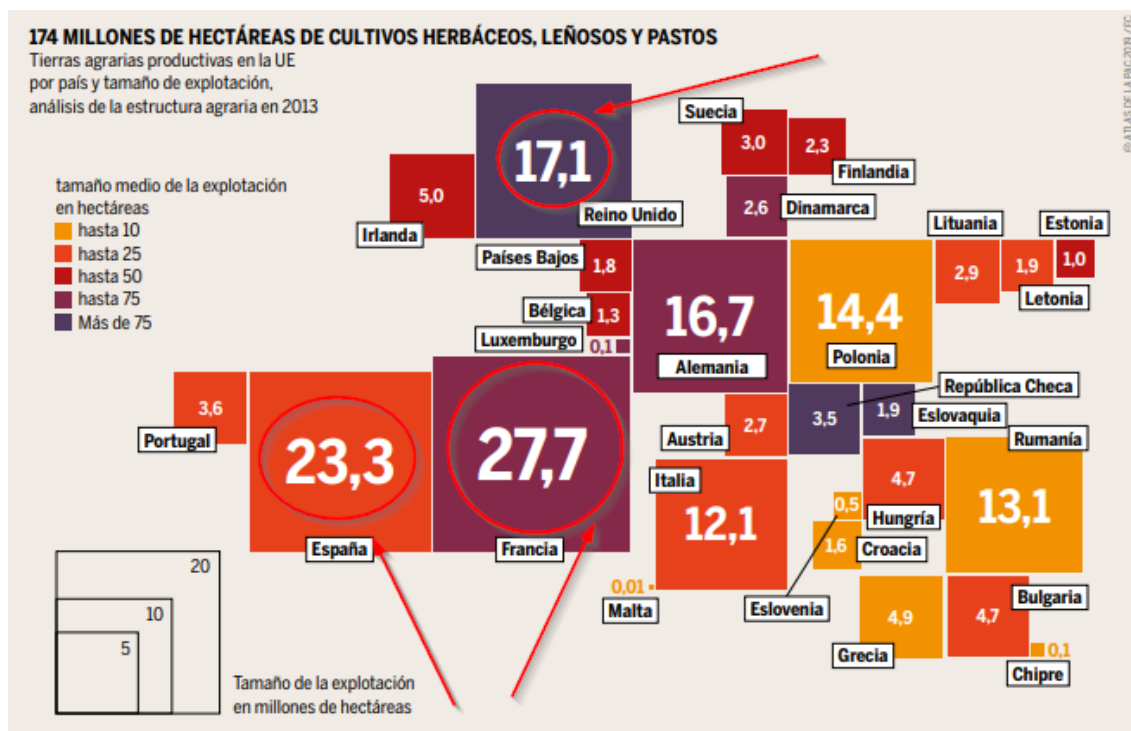
<sup>76</sup> Glossary: *European Economic Area (EEA)*. Eurostat. Last modification: 3<sup>rd</sup> February 2020. Brussels. [online][date of access: 27<sup>th</sup> March 2020] Available at: [https://ec.europa.eu/eurostat/statistics-explained/index.php/Glossary:European\\_Economic\\_Area\\_\(EEA\)](https://ec.europa.eu/eurostat/statistics-explained/index.php/Glossary:European_Economic_Area_(EEA))

<sup>77</sup> DOHERTY, B and TEMPLE LANG, J. and MCCRUDDEN, C and MCGOWAN, L and PHINNEMORE, D and SCHIEK, D G., *Northern Ireland and 'Brexit': The European Economic Area Option* (April 4, 2017). U of Michigan Law & Econ Research Paper No. 16-038; U of Michigan Public Law Research Paper No. 543; Queen's University Belfast Law Research Paper 2018- 01. Available at SSRN: <https://ssrn.com/abstract=2933715>

<sup>78</sup> DOHERTY, B and TEMPLE LANG, J. and MCCRUDDEN, C and MCGOWAN, L and PHINNEMORE, D and SCHIEK, D G, op cit. 77

<sup>79</sup> DOHERTY, B and TEMPLE LANG, J. and MCCRUDDEN, C and MCGOWAN, L and PHINNEMORE, D and SCHIEK, D G, op cit. 77

350.000 million pounds as part of their CAP amount.<sup>80</sup> UK is the third country in Europe in agricultural size, after France and Spain, as we can see in the image below.



Source: Atlas de la PAC

The image shows us the percentage of productive agricultural land in the EU in 2013. These productive lands are used both for agricultural fields for planting, and for fields for feeding cattle, as extensions of land that are used for obtaining wood. And the colour of each box gives us the average size of each farm in millions of hectares. It is very interesting to see how the average size of a farmland in the UK exceeds France and Spain, the two EU territories with the most productive agricultural land.<sup>81</sup>

This obvious fact, joining the amount of money that only Northern Ireland had received in the last years, leads to consider that, in terms of agriculture, UK and mostly, Northern Ireland, will be the most affected.

The paper mentioned before gives us two options to make feasible the participation of Northern Ireland to the EEA:

1. The first one, would require the joining of the UK to the EFTA. It could be a first move to be an EEA member. But, this EEA membership, would be only for Northern Ireland. This limitation of the membership would require an amend-

<sup>80</sup> CAMPS, CARLOTA. *Irlanda del Norte, la más perjudicada por el Brexit*. El Nacional.cat. 16<sup>th</sup> June 2016. London. [online][date of access: 20<sup>th</sup> March 2020] Available at: [https://www.elnacional.cat/es/internacional/irlanda-norte-brexite-reino-unido-union-europea-referendum\\_104826\\_102.html](https://www.elnacional.cat/es/internacional/irlanda-norte-brexite-reino-unido-union-europea-referendum_104826_102.html)

<sup>81</sup> View: [http://www.porotrapac.org/documentos/atlasdelapac2019\\_es\\_web\\_190408.pdf](http://www.porotrapac.org/documentos/atlasdelapac2019_es_web_190408.pdf)

ment of the EEA Agreement. And such amendment, to succeed, must have the approval of all the members of the EU, the EU itself and all the members of EFTA that participate of the EEA, so, Switzerland would not be able to decide in this matter.<sup>82</sup>

2. The second option that would be possible, is the joining of only Northern Ireland to the EEA. It would be the first time that a part of a national entity would join EEA (Northern Ireland is a country part of the UK). This situation would require, as the first situation, an amendment of the EEA Agreement, with the approval of the EU, its member States and all the Member States of the EFTA that are Member States of the EEA (again, Liechtenstein, Norway and Iceland).<sup>83</sup>

What we can glimpse in this proposal is clearly not a panacea to the situation on the Irish border. While it is true that it would bring some maintenance of the current situation, it is obvious that certain political and legislative challenges must to be faced for Northern Ireland. It is the area that will be most affected by Brexit at the end of the transition period we were talking about earlier.

One of the disadvantages that we see here is that, the EEA Agreement does not encompass the free movement of agricultural products as part of the free movement of goods. Even this material problem, the main goal is, the liberalization of the agricultural trade.<sup>84</sup>

Also, in the case that Northern Ireland itself would join the EEA, the administration would have to acquire more legislative competence in the application of sanitary and phytosanitary measures in trade, therefore, this increase in legislative powers would be detrimental to their possible level of influence in the EU. Remember that some members of the EEA are not members of the EU (Norway, Liechtenstein, and Iceland, which are part of the EFTA), so they have the right to be consulted only in proposals for EU law, but that right only involves consultation, at no time is being able to intervene in EU decision-making<sup>85</sup>.

In conclusion, the advantages that Northern Ireland could achieve with the accession to the EEC such as the limitation of the ECJ jurisdiction and the compliance with some of the EU legislation are, in our opinion, minimum with the great disadvan-

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<sup>82</sup> DOHERTY, B and TEMPLE LANG, J. and MCCRUDDEN, C and MCGOWAN, L and PHINNEMORE, D and SCHIEK, D G, op cit. 77

<sup>83</sup> DOHERTY, B and TEMPLE LANG, J. and MCCRUDDEN, C and MCGOWAN, L and PHINNEMORE, D and SCHIEK, D G, op cit. 77, pag. 9-10

<sup>84</sup> MCMAHON, J, *Northern Ireland and Brexit: Avoiding a Hard Border – EEA or a Special Protocol?* (December 4, 2017). UCD Working Papers in Law, Criminology & Socio-Legal Studies Research Paper No. 21/17. Available at SSRN: <https://ssrn.com/abstract=3082202>

<sup>85</sup>MCMAHON, J, op cit. 84

tage of being no more a CAP and CFP beneficiary because, as we said, Northern Ireland has an economy based principally in agriculture and fisheries.

#### **4.2.2. Creation of a Special Protocol on Trade.**

To talk about the possible Protocol in trade for the island of Ireland, we should introduce the example on which that Protocol could be based. In McMahon's work, we are told about two different Protocols. The first of all, Protocol 3 to the Treaty of Rome, which applied to the then divided Germany, so that it could have a certain internal market between the two halves of the country.<sup>86</sup> The other one, a Protocol applied to the island of Cyprus, it would not be analysed.

We are going to analyse the first Protocol. The accession of West Germany to the European Communities took place the 1<sup>st</sup> January 1958. Recall that, at the end of the Second World War, Germany was divided in two parts: West Germany, under the Allies control (France, UK and USA), and East Germany, under the USSR control. Even Berlin itself was splitted in 2 parts (West and East Berlin).

The post-war situation in the city and in the whole country was devastating. One measure that the EEC Member States was to improve the trade between the two parts of Germany. This Protocol ceased to be effective when East Germany invoked the Art. 23 of the Bonn Fundamental Law (West Germany Constitution) to implement the unification of Germany in August 1990.<sup>87</sup>

The most important assets to take into account from this Protocol are:

1. The East Germany products could enter West Germany without any duty regarding the Common Custom Tariff or Common Commercial Policy.
2. The trade arrangements that West Germany and East Germany would achieve, would have as a principal goal, not to violate the principles of the Common Market, either harm the other EEC Member States economies.
3. The EEC Member States, with the Regulation 1756/82, would apply common custom duties to East German products (but not West Germany)
4. West Germany had to inform the other Member States about any important trade arrangements that would sign with East Germany.

This Protocol only affected the German internal Market, but, the EEC never considered East Germany as a Member State<sup>88</sup>. We can assume that this Protocol in West Ger-

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<sup>86</sup> MCMAHON, J, op cit. 84

<sup>87</sup> DE IRAZAZÁBAL, PABLO J, 1945: *El reparto de Alemania y Berlín entre los Aliados*. El Mundo. 05<sup>th</sup> November 2014. Madrid. [online][date of access: 28<sup>th</sup> March 2020] Available at: <https://www.elmundo.es/la-aventura-de-la-historia/2014/11/05/5458fbd2268e3e982f8b458c.html>

<sup>88</sup> MCMAHON, J, op cit. 84

many is a good example so that it can be extrapolated to the situation in Northern Ireland. We would be talking about a protocol between a Member State (Ireland) and a state that is no longer a member (Northern Ireland).

For Northern Ireland, agricultural trade with Ireland accounts for 82% of its exports. Neither Scotland nor Wales nor England export as much to Northern Ireland in terms of agricultural products as its southern neighbours on the island. We could deduce that this solution could maintain to a certain extent the status quo of relations on the island.

We have already said that the 4 most important assets that we have highlighted above would be a good basis for the creation of that Protocol. That instrument should be annexed to the Withdrawal Agreement as a fundamental part of Brexit, which it really is. We have already pointed out in previous parts of the work the importance of the Irish border in this case, the consequences that it could have for both countries and for both the European Union (with its Member States) and the UK.

This Protocol would allow Northern Ireland to remain outside the EU, without the need to accept any type of EU legislation, as would happen if it were a member of the EEA (the greatest supporter of a total exit from the European Union and a separation of all kinds of legislation). It would also allow Northern Ireland to be outside the purview of the ECJ. In a Protocol of this kind, we must understand that the more specific it is, the better and more effective would be. The main objective to be achieved with this type of situation is that the instrument used to regulate relations between two entities offers the greatest possible legal security.

This Protocol could truly create a legal basis for the actions of the parties involved, as it would regulate, the legal standards to apply. In the GFA, certain institutions were already created in 2 different strands so that they could monitor relations between the two parts of the Agreement. These bodies could be, appealing to the principle of economy, those in charge of ensuring that said Protocol is strictly complied with. The scope of dispute settlement should perhaps follow the same path. That they were the same bodies that carry out the monitoring of the Protocol. But we could offer a more effective option. That in that Protocol a provision must be included by virtue of which the two parties submit their controversies regarding the Protocol to the ECJ, with the consent of the two Irish territories.

Why submit a dispute to a Court that does not have jurisdiction over one of the involved parties? We would appeal to the principle of economy. A Protocol based on legal points such as those described above in the case of the West Germany Protocol on Trade should have certain provisions that are in accordance with the principles of the EU Single Market, as well as the Customs Union. And if we apply to the principle of

economy, the jurisdiction of the ECJ, we understand that it is the best solution so that they could solve the vicissitudes that could arise between Ireland and Northern Ireland.

#### **4.2.3. Creation of a “Common No-Custom Area” for Irish-made products.**

We already see the European Commission proposal (Backstop), supported by the government of Theresa May, and the political parties’ opinions regarding this backstop, but, is there an alternative to this proposal that could be a solution to the border issue?

Sacerdoti and Moran (2019) had proposed an alternative that could be a solution to the Irish border issue.<sup>89</sup> Their proposal to the backstop, entails the creation of a free circulation area, where the only products that would be able to be admitted in this zone would be products originated in Northern Ireland and the Republic of Ireland only, under the dispositions of the art. 24 of the General Agreement on Tariffs and Trade (GATT). This article is the one that establishes the *Territorial Application, Frontier Traffic, Customs Union and Free-trade Areas*.<sup>90</sup>

This means that the products from the UK that would want to enter the Republic of Ireland as final destination through any port or airport from Northern Ireland, would have to be subject to regular custom controls. This provision would be also applied to all the products that were produced in the EU territory, (we have to understand as EU territory, the continental territory of the EU), entering the Republic of Ireland with final destination, Northern Ireland.<sup>91</sup>

One of the main items of this proposal is to label the domestic products as “Irish-made” ones. We should consider that a product that is not labelled as such, could not be able to have the same consideration as the products that are labelled as “Irish-made”.<sup>92</sup> We can consider this item is important to avoid the eventual abuse of the regime from some UK economic operators that would like to use this special situation to avoid pay taxes and put under the Irish authorities all their stuff to be examined in a customs control. The authors say also that a good way to ensure this proposal would be to maintain the EU SPS Agreements (Sanitary and Phytosanitary Agreements).

If this was the offer that the negotiating parts would apply to the Irish border, it would be the second time that the EU would accept a special trade regime. The prece-

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<sup>89</sup> SACERDOTI, G AND MORAN, N. *An Alternative to the Irish Backstop: An All-Ireland 'Common No-Custom Area' As a Frontier Traffic Area under Art. 24 of Gatt for Products Originating in the Island ('Ireland-Made'), Allowing Regulatory Divergence by the UK in Respect of the EU without Necessitating a Hard Border in Ireland* (September 26, 2019). Bocconi Legal Studies Research Paper No. 3660166, September 2019. [online][date of access: 13<sup>th</sup> March 2020] Available at SSRN: <https://ssrn.com/abstract=3460166>

<sup>90</sup> SACERDOTI, G AND MORAN, N. op cit. 89

<sup>91</sup> SACERDOTI, G AND MORAN, N. op cit. 89

<sup>92</sup> SACERDOTI, G AND MORAN, N. op cit. 89



dent to this Irish proposal would be the situation between Cyprus and Northern Cyprus. We would like to remember that Northern Cyprus is, de facto, non-EU territory. The products that are produced in Northern Cyprus are able to pass freely to the other side of the border of the island.<sup>93</sup>

That proposal would be a good one to apply to the Irish border. The rules of the World Trade Organization (WTO) in this case, the provisions that are part of the GATT, could provide better legal certainty to the situation that should replace backstop. Remember that the backstop should only be in operation while the negotiating parties did not find a better agreement to apply, or while the agreement was being negotiated.

This suggestion closely resembles the sentence of the Special Protocol on Trade described before. But the reality is, that the legal basis of each one is very different. While the previous point focused on taking some existing work points in a pre-existing Protocol, in this proposal presented to us by Sacerdoti and Moran, the legal basis is, as previously stated, the General Agreement on Tariffs and Trade.

This is an option that could have acceptance among the negotiating parties. It is clear that both the EU and the UK are signatory states to the GATT and member states of the WTO. Using a common legislative base to find a converging point where the aspirations and interests of the parties are largely (or totally) satisfied is a good starting point. As specific as the content of a Protocol may be, it is still an instrument that, in that case, would only be used by two entities. An international treaty such as the GATT generates more legal certainty and trust.

As the authors say, *“this proposal would grant freedom of external trade relations to the UK and would not entail custom barriers between Northern Ireland and the rest of the UK”*.<sup>94</sup> This regime would affect only the Island of Ireland, the customs traffic between Northern Ireland and UK, would remain as always.

#### **4.3. Reunification of Ireland**

The reunification of Ireland has been on the table for a while now. And even more so with the victory of Sinn Féin in the Irish elections in early February. But it is evident that it is an option that perhaps has in the situation that we are, little journey.<sup>95</sup> The basis of this statement lies in the Irish / North-Irish political spectrum that continues to demand the unification of the island, or that, at least, has it on its list of political objectives to achieve.

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<sup>93</sup> SACERDOTI, G AND MORAN, N. op cit. 89

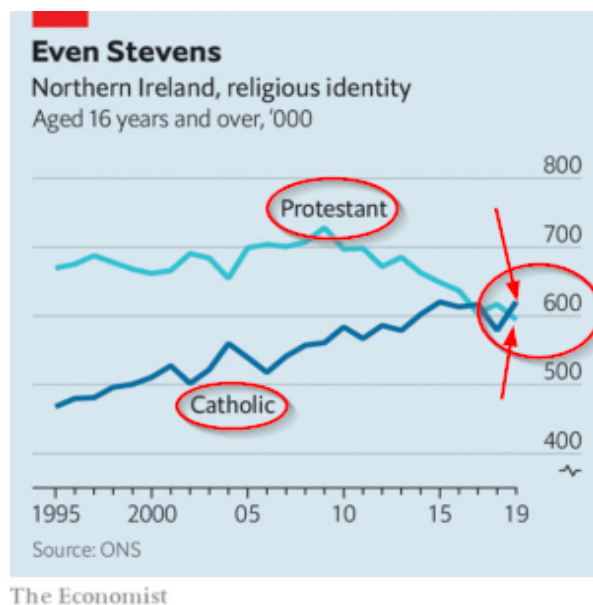
<sup>94</sup> SACERDOTI, G AND MORAN, N. op cit. 89

<sup>95</sup> *Irish unification is becoming likelier*. The Economist. February 2020. London. [online] [date of access: 17<sup>th</sup> February 2020] Available at: <https://www.economist.com/leaders/2020/02/13/irish-unification-is-becoming-likelier>



We speak again, of political party Sinn Fein. In its early days, it advocated the independence of Ireland from the UK, and now its main political goal in capital letters is unification with Northern Ireland. We could try to find out what would be the essential requirement for this to take place among the North-Irish population. Let us remember that this conflict between north and south resides solely and exclusively in religion. Catholics against Anglican Protestants and vice versa.

An article from The Economist from the beginning of this year 2020, gave us a very interesting fact. For the first time in history, the North Irish population that declares itself Catholic outnumbered the Anglican Protestant.<sup>96</sup>



Source: The Economist<sup>97</sup>

Another fact that could give us a boost in this theory of an Irish reunification, happens through the vote of the Brexit referendum. In Northern Ireland, the option to remain members of the European Union won. We have already seen in other sections that Northern Ireland is a recipient of subsidies from the European Union as part of the CAP. It was in their interest to stay in the Union. Very few people in the Belfast Government believed the Downing Street Government when they were told that the losses of the CAP would be compensated by a UK-owned land policy. It may be possible, but in the very long term.

The idea of the reunification nowadays is the GFA. If the Republic of Ireland wants to be unified with Northern Ireland, the north part of the island should cele-

<sup>96</sup> *Brexit and Sinn Fein's success boost talk of Irish unification*. The Economist. February 2020 London. [online] [date of access: 17<sup>th</sup> February 2020] Available at: <https://www.economist.com/briefing/2020/02/13/brexit-and-sinn-fein-success-boost-talk-of-irish-unification>

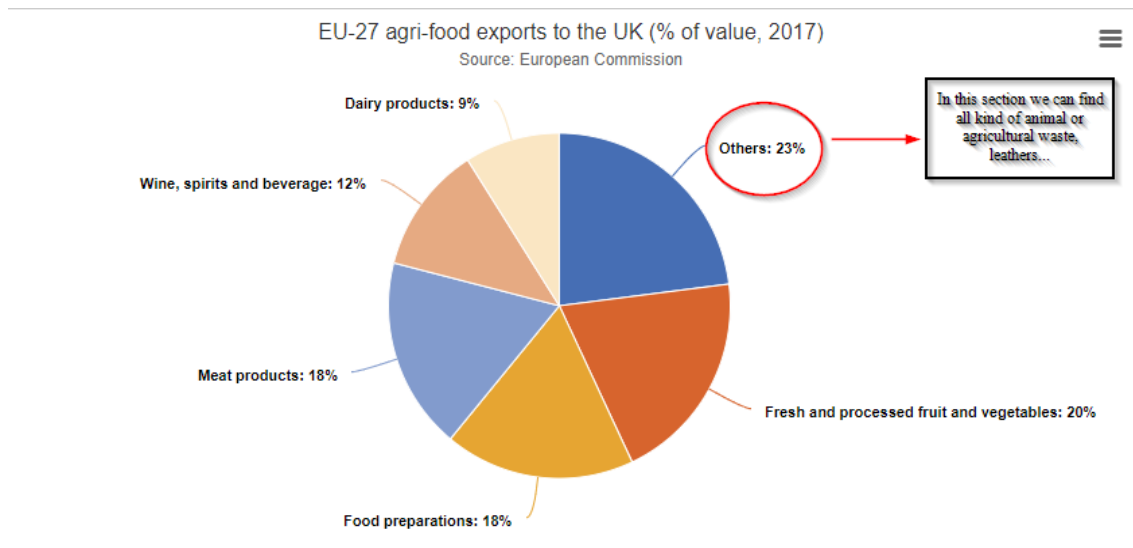
<sup>97</sup> See Footnote number 95.

brate a referendum and decide if they want to be fully Irish or maintain the current state they have now.

#### 4.4. The inverse contingency plan and specific legislation. The Trade Weight Index.

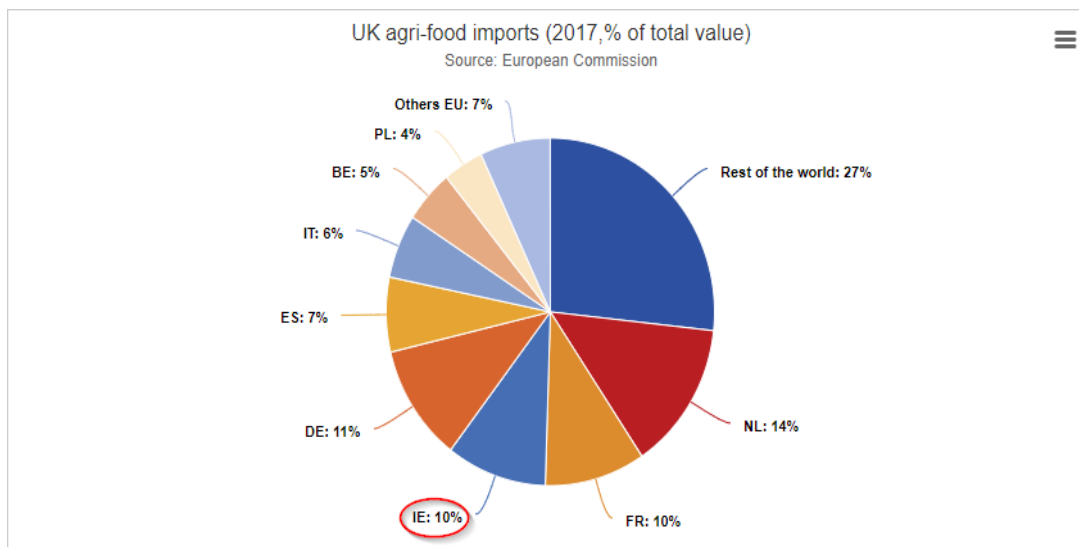
In this section, we will try to create our own solution to this issue. First of all, we have to establish a basis where this proposal lies. This proposal only addresses the problem at a trade sphere. We consider that, in a people's movement between territories field, the CTA creates a good legal basis for the free movement of people. This arrangement was initiated by both countries in 1922 and by the moment, this arrangement works effectively. In terms of trade, between the EU and the UK, one of the most important sectors, is the agri-food one. As we saw before, UK is the third country in Europe with more millions of hectares of land in terms of agriculture, and the first one to have to largest average size of land (more than 75 hectares per piece of land).

The European Union and the UK have a beneficial agri-food relation.



Source: European Commission

This are the most exported products from the EU (as a whole) to the UK. But we have to see, within the EU, which Member States are the ones that export the most to the UK.



Source: European Commission

In this graphic, we see that Ireland is the third exporter from the EU to the UK.

Now, we are going to explain an imaginative proposal with an example created for this paper. The data that we used as a base for make our experiment, came from OEC website of the year 2017<sup>98</sup>. The main goal of this experiment is to establish a “solution” based in a modification of the principle of freedom of movement of goods.

We can describe this initiative, as a peculiar application of an imports and exports quota system. The main idea of this suggestion would be to favour commercial exchanges that were truly important for operators on both sides of the Irish border, penalizing punctual and merely speculative trade and the creation of a specific legislation regarding traceability of the products (a hybrid proposal with Sacerdoti and Moran’s one and the creation of the Special Protocol on Trade).

Normally, a quota system works as follows. If Operator A wants to export Operator B a certain product, B's import quota system will impose a quantitative ceiling on exports of that product that can pass freely through the border (in case there is some freedom of movement of goods). From this limit, operator A will have to pay certain charges (proportional to the amount of more he wants to export) to be able to export his products. Our proposal would have the same structure, but its application would be just the opposite.

The basis of our trade proposal lies in what we could classify or determine as the *trade weight index*. What this concept would help us establish is, for economic operators (in this case Ireland and Northern Ireland), which are the most important and beneficial trade exchanges for them. The more important and beneficial to both is the prod-

<sup>98</sup> See: [https://oec.world/en/visualize/tree\\_map/hs92/import/gbr/irl/show/2017/](https://oec.world/en/visualize/tree_map/hs92/import/gbr/irl/show/2017/) and [https://oec.world/en/visualize/tree\\_map/hs92/export/gbr/irl/show/2017/](https://oec.world/en/visualize/tree_map/hs92/export/gbr/irl/show/2017/)

uct imported / exported, the less pecuniary burden must be paid by economic operators, up to the point of having no pecuniary burdens to pay. The main goal of this proposal would be to create an intra-Irish market that would have several levels of importance, and create incentives to exchange those products that are truly important for the internal market of the island. To determine this trade weight, we should base the concept on the corresponding money amount of each product in the trade "basket" of imports and exports. We must keep in mind that determining a percentage as the inflection point to understand that a product is important in this "basket", is not easy.

In terms of the specific regulation, the idea of Sacedorti and Moran is to maintain the EU legislation, the labelling of the products and make the article 24 of the GATT the legal basis of the proposal. Our idea is to create a specific legal framework for the traceability and safety of the foodstuffs only for the Irish territory, taking into account the GATT and the EU legislation but not making them our legal basis. With this we can understand that the proposal of Sacerdoti and Moran, previously analysed, could lead to certain abuses by operators, both in the Republic of Ireland and in Northern Ireland, even from the island of Great Britain, if we apply this literally.

Recall that the authors' proposal was to subject an open border between the two Irish to the rules of Article 24 of the GATT and that products that freely pass through the border should bear an "Irish-made" label, maintaining the EU legislation in terms of sanitary and phytosanitary procedures. How can you reliably determine that a product is Irish-made? If we talk about butter, should we go see the cow that produces the milk, and be present throughout all the steps that we must do to produce butter? Where is the cow? Is *conditio sine qua non* that the cow must be in the island of Ireland before the manufacturing of the product?

We are not saying that the proposal would not comply with the WTO regulations in terms of trade. Is obvious that all the legislation that is not EU made, must comply with the WTO legal framework. What we are saying is that, the idea of subordinate the proposal in only one article of the GATT (in this case, article 24, which establish the Common Custom Areas), would have a little modification with the creation of the new regulation. This regulation would have a single objective taking into account the "Irish-made" label of Sacerdoti and Moran's proposal; and that would be the creation of a new product traceability regulation, applicable to the Irish Island territory. The fact that Northern Ireland is not an EU member state (and in this proposal we assume that it would not be part of EEA or EFTA), make us to consider that the EEA and EFTA members would feel displeased by the fact that a non-EU member is beneficiary of a EU legislation without being either an EU member, or a EEA or EFTA member.

The fact that this project is based solely on Article 24 of the GATT and an eventual maintenance of the EU legislation, we understand that it would not be sufficient and

effective, since we have to point that the traceability rules from the European Union, would not be in force in the Northern Irish territory, since that country is no more an EU Member State and, we can consider not very effective to create an Optim-in/Optim-out system for the Northern Ireland territory.<sup>99</sup> What is proposed in this section is different from that of Sacerdoti and Moran. As we have pointed out before, the structure of this proposal is based on its own application of an import and export quota system, and the creation of a specific legal framework in terms of traceability.

And another asset that we have to take into account would be the form of the instrument that could include all this matters. Here the Special Protocol on Trade takes place again. As we saw before, this special Protocol would create the relation basis between Northern Ireland, Ireland and the EU as the one applied to West and East Germany during the Cold War. In this case, our Special Protocol on Trade for the island of Ireland would include:

1. The relation basis between Ireland and Northern Ireland, and the relations of both countries with the unions in which they participate (Ireland-EU and Northern Ireland-UK) in the same way as we saw in the Special Protocol on Trade in Germany.
2. The contingency plan that we are going to explain hereunder.
3. The new legislation regarding products traceability between the two Irelands, to create a stable basis for the application of the “Irish-made label” of Sacerdoti and Moran.
4. A control system composed by the institutions created in virtue of the signature of the GFA in 1998.

Determined the principal aim and the legal sphere of our experiment, we will begin the explanation of the trade matter. For this we will use tables and graphics, so it would be a more visual context and be more understandable to the reader. First, make a note. The data used was originally for the UK as a whole. We have made the necessary calculations to use, in the example, data that we extrapolate to the territory of Northern Ireland (the percentages). The data that we have used to make the calculations has been the percentage of population that Northern Ireland constitutes in the UK in total.

Secondly, we have to point that all the data relating to the limits and the TWI point of importance, is completely randomly established, and obviously could be an-

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<sup>99</sup> Regulation (EC) N° 853/2004 of the European Parliament and of the Council, of 29 April 2004, laying down specific hygiene rules for food of animal origin. (OJ L 139, 30.4.2004, p.55) [online][date of access: 1<sup>st</sup> April 2020] Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02004R0853-20190726&from=EN>

analysed and modified by economists skilled in the subject. If we have used these data it is to be able to establish a basic model of this experiment. UK has a total population of 66.400.000 people<sup>100</sup>. Northern Ireland has 1.882.000 people<sup>101</sup>. It represents the 2.83% of the total population of the UK.

We are going to work with 3 type of products: Animal products, vegetable products and foodstuffs, and our currency will be EUROS (€). We have to point this now because, the model that we are going to create it will be based in the principle of economy. The most simple and easy we make the model, the most understandable would it be for the readers.

WHAT IMPORTS NORTHERN IRELAND FROM IRELAND? /WHAT EXPORTS IRELAND TO NORTHERN IRELAND?

Type of products	Total money (NI)	Percentage (NI)
Animal Products	72.789.128'65€	15%
Vegetable Products	8.750.182'50€	2.2%
Foodstuffs	68.659.244'90€	14%

Source: Own elaboration based on the data extracted from OEC website.

WHAT EXPORTS NORTHERN IRELAND TO IRELAND? / WHAT IMPORTS IRELAND FROM NORTHERN IRELAND?

Type of products	Total money (NI)	Percentage (NI)
Animal Products	30.687.991'13€	5.7%

<sup>100</sup> See : <https://www.google.com/search?q=reino+unido+poblaci%C3%B3n&aq=chrome.0.69i59j69i57j46j0j46j69i61j69i60l2.1646j0j7&sourceid=chrome&ie=UTF-8>

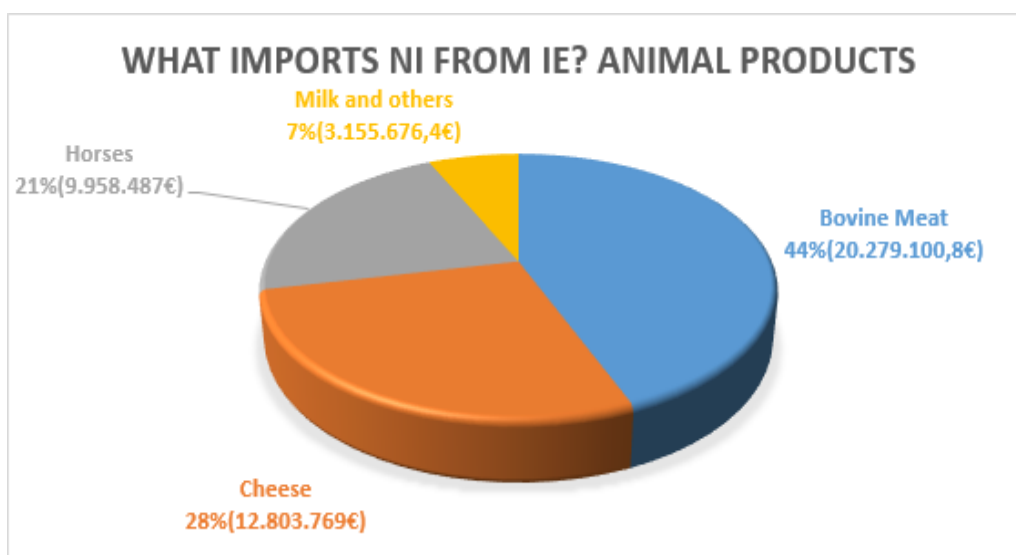
<sup>101</sup> See : [https://www.google.com/search?xsrf=ALeKk00NZ\\_1\\_DKTywRf8oTBNi7ZPJJPfEA%3A1585748085114&ei=dZiEXsu\\_BsmFjLsPke-K4kA4&q=irlanda+del+norte+poblaci%C3%B3n&aq=ir&gs\\_lcp=CgZwc3ktYWlQAxgCMgQIIxAnMgQIIxAnMgQIIxAnMgQIABBDmgQIABBDmgQIABBDmgQIABBDmgQIABBDmgIADIECAAQOzo-ECAAQRICcgQRY2IkEYKWdBGgBcAF4AlABZYgBrAKSAQMxLjKYAQCgAQGqAQdnd3Mid2l6&sclint=psy-ab](https://www.google.com/search?xsrf=ALeKk00NZ_1_DKTywRf8oTBNi7ZPJJPfEA%3A1585748085114&ei=dZiEXsu_BsmFjLsPke-K4kA4&q=irlanda+del+norte+poblaci%C3%B3n&aq=ir&gs_lcp=CgZwc3ktYWlQAxgCMgQIIxAnMgQIIxAnMgQIIxAnMgQIABBDmgQIABBDmgQIABBDmgQIABBDmgQIABBDmgIADIECAAQOzo-ECAAQRICcgQRY2IkEYKWdBGgBcAF4AlABZYgBrAKSAQMxLjKYAQCgAQGqAQdnd3Mid2l6&sclint=psy-ab)

Vegetable products	12.664.030'84€	2.5%
Foodstuffs	65.502.098'71€	12%

Source: Own elaboration based on the data extracted from OEC website

These are our products. We chose this 3, considering that are the most important and more common in intra-Ireland trade.<sup>102</sup>

Now, we are going to make a breakdown of every group of products, in the same order than the tables. First, we are going to talk about the importations of Northern Ireland from Ireland in animal and agricultural products, as well as foodstuffs. One of the points that is good to make is that, in the graphics that we are going to use, there are only 4 products. We are going to use only the 4 most imported and exported products in the intra-island trade.



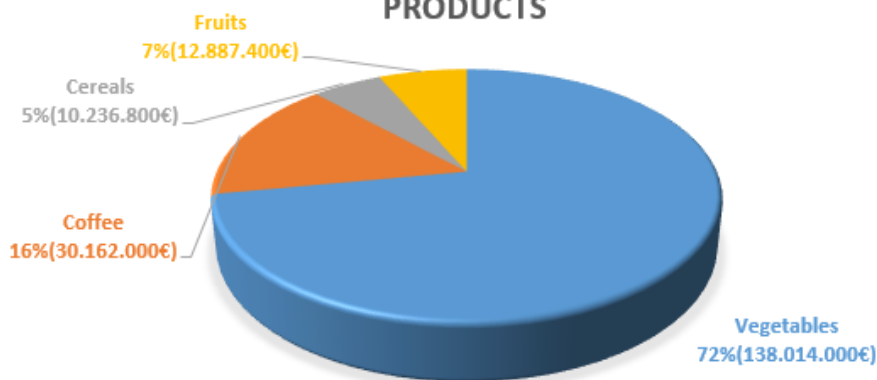
Source: Own elaboration based on the data extracted from OEC website

As we can see in this graphic, the most imported product inside the animal products' group is Bovine meat. In the grey group, aside from horses, other living animals that are imported are, for example, donkeys and mules.

<sup>102</sup> In this case, the percentages we have used in each table are the data we have extrapolated from the UK data as a whole in each of the product groups. We understand that we should create this fiction, since if we did not create it, the calculations and setting the ceiling for our plan would not be effective



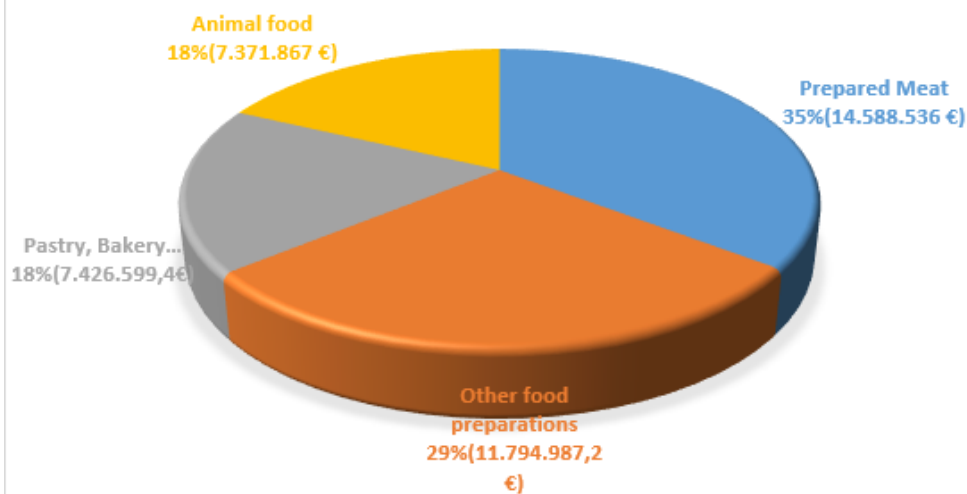
### WHAT IMPORTS NI FROM IE? AGRICULTURAL PRODUCTS



Source: Own elaboration based on the data extracted from OEC website

In this graphic is so clear that the agriculture is very important for the intra-Ireland trade. The fact that vegetables are the 72% of the imports of Northern Ireland gives us some sort of clue of what would be the trade weigh index for this products.

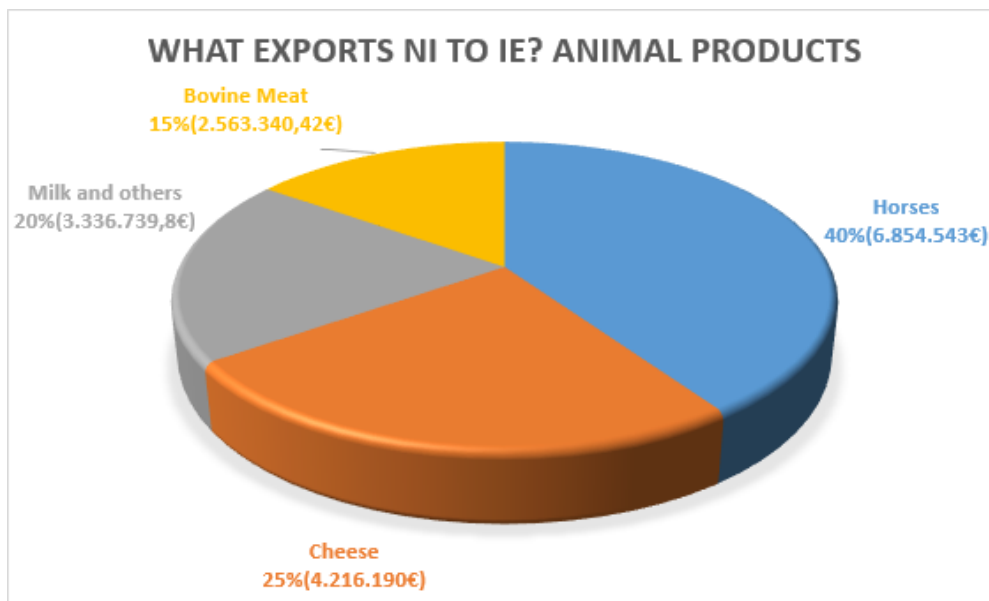
### WHAT IMPORTS NI FROM IE? FOODSTUFFS



Source: Own elaboration based on the data extracted from OEC website

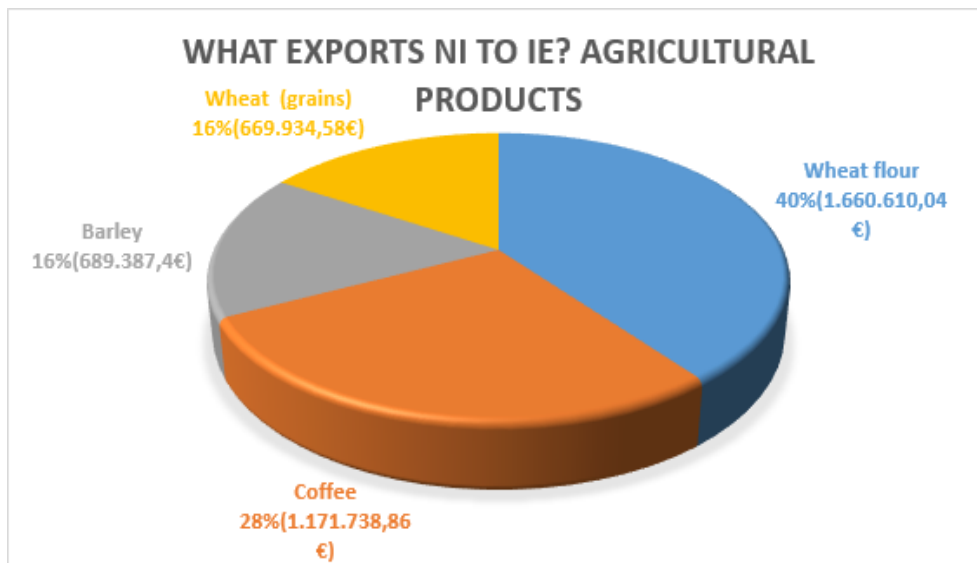
In this image we can see the 4 most imported foodstuffs products in Northern Ireland. But, what is a foodstuff product? We can describe them as all merchandise that requires a previous period of handling before consumption. These products are not raw materials. These are always elaborated.

Now, is the exportations from Northern Ireland to Republic of Ireland turn.



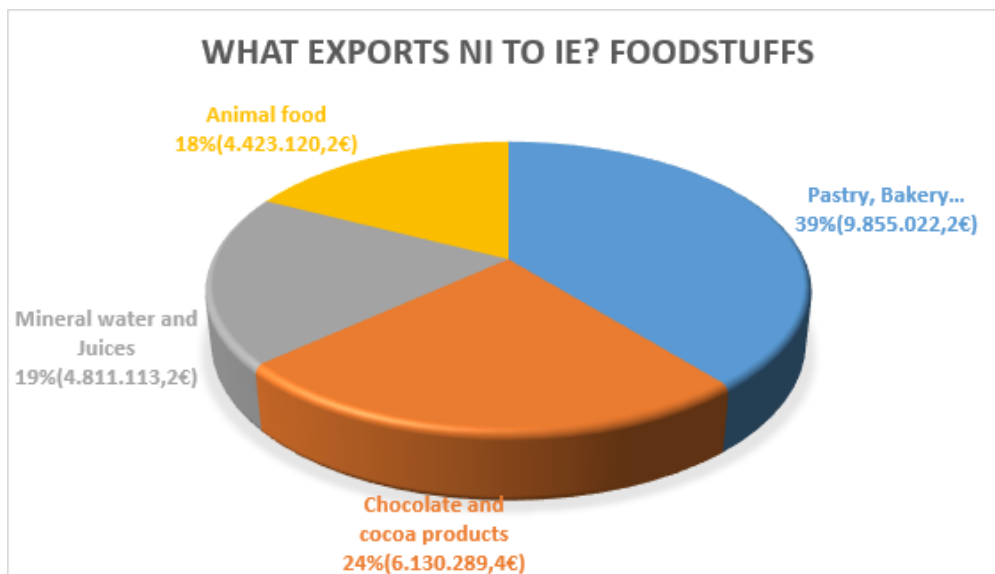
Source: Own elaboration based on the data extracted from OEC website

In this case, we see that, comparing of the animal products imported from Ireland, Northern Ireland exports a 29% less in bovine meat than the imports. It can be useful when we will have to put the limit in our trade weigh index.



Source: Own elaboration based on the data extracted from OEC website

In this graphic, we see, comparing to the imports one, that Northern Ireland exports so different agricultural products that they import to Republic of Ireland. We see here that the exports of Northern Ireland are base in cereals, mostly in wheat in two forms: in form of flour and in form of grains.



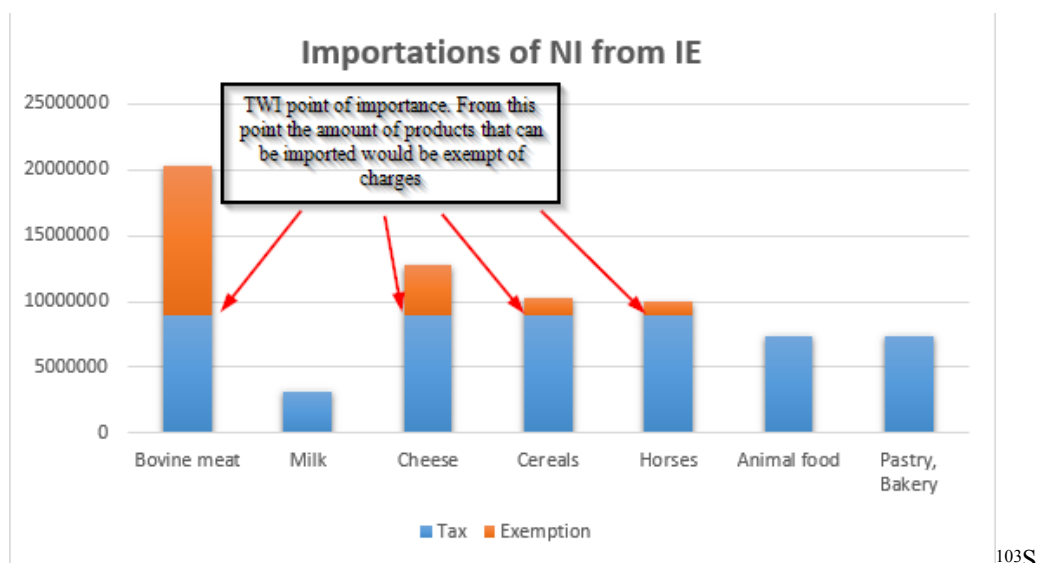
Source: Own elaboration based on the data extracted from OEC website

In this graphic happens a similar situation as the previous one. In this case, the only two products that are repeating here are the pastry and bakery products and the animal food. But in any time we can see here any sign of animal products that are been elaborated or handled into a certain extent to be consumed.

Now what we must do is establish the point from which it can be understood that a product, according to the trade weight index, can freely pass through the Irish border without the need to pay any tax. That is what we will call the *TWI point of importance*. Probably, this is the most difficult step in our experiment. What we consider important in terms of trade? The concept of importance in this area is closely linked to our trade weight index. Everything that we consider *important* we must understand that it has a higher trade weight index than other products that are imported or exported (is something that is imported in vast quantity by the operators). We must also understand what is important as what in the country's commercial system constitutes the core of its exports and imports.

In this case, our core is constituted by the products analysed before: Animal products, Agricultural products and Foodstuffs. The criteria that we will use to establish the *importance* inside the trade weigh index is the monetary one. Another question that we should address is, if we have to establish the same point of importance for Northern Ireland than for Ireland. The answer would be no. Why? Because is the paradigm of inequality (to treat two different situations the same way). We just cannot treat Republic Ireland and Northern Ireland as equals, because the situation in an economic spectrum is not the same. We consider proper to benefit the two Irelands but, always, defending their interests.

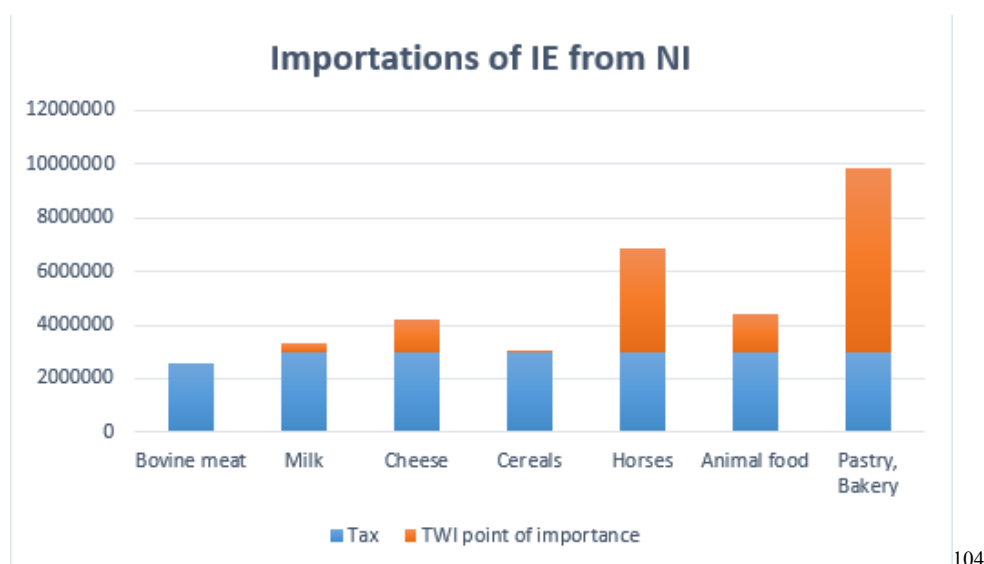
Now we are going to describe the situation for the importations of Northern Ireland from Republic of Ireland.



Source: Own elaboration based on the data extracted from OEC website

In this picture, we can see that the *TWI point of importance* is established in 9.000.000 €. 4 out of 7 categories analysed in the graphic would have been benefitted of the exemption. The other categories, if they could increase their amount of money in the “basket” of importations, they would have to pay less taxes.

As we said before, we are not going to establish the same *TWI point of importance* for Ireland, since the economy of the southern zone of the island is not in the same level as the Northern part, and even the data are not similar.



<sup>103</sup> The colour duality does not mean that the blue part will continue to pay taxes. We used two colours to make more visible the TWI point of importance. As the money amount in the “basket” exceeds the TWI, all the category will be tax exempt.

<sup>104</sup> See footnote 100.

In this second graphic, the category of *Cereals* is composed by Barley, Wheat grains and Wheat flour. In this case, we can see that the *TWI point of importance* is established at 3 million euros. As was said before, the situation in an economic spectrum of both countries is not similar, even politically are not similar. In this graphic we can see that, 6 out of 7 categories are benefitted with the exemption of paying taxes, since are surpassing the *TWI point of importance*. However, categories as milk or cereals, are surpassing the limit with a tiny amount of money.

Now, we are going to develop a little more the idea that, the more money you spend exporting and importing products, the less taxes you would pay. As we saw previously, Northern Ireland and Ireland had a different *TWI point of importance*. Certainly, the difference would be applying to the taxes rates that would have to pay the economic operators, and this rates would be different to the products, too. As a basic example, not using the data previously exposed, if operator A wants to import Bovine Meat from operator B, the tax rates imposed to the quantity of meat (in money) imported would vary.

For instance, operator A wants to import 100.000€ in bovine meat from operator B. The tax rate would be of the 35% of the amount. If operator A raises the amount of money to 250.000€, the tax rate would be of the 20%. In the case that this import amount would be increased to 500.000€, the tax rate would be of the 10%; and when the amount of money of the importation of bovine meat would exceed the *TWI point of importance*, the tax rate would be 0, and the meat would be able to arrive to operator A.

What we want to achieve with this proposal would be, as we mentioned before at the beginning of the section, to improve the essential trade between the operators (Ireland and Northern Ireland). Everything that we can consider essential in trade regarding this experiment, in a “negative” way of presentation, is everything that could cause a harmful effect in the trade basket of the operator (and in the consumers’) with their absence. The “essential” products, as we said before, can change as the economy and the consumer and operator’s necessities, therefore, is something illogical to create a *numerus clausus* list of products.

In conclusion, our proposal lies in three pillars: the first one is our inverse contingency plan. The second one is the creation of the new traceability regulation for the Island of Ireland, making sure that, all the products can be traceable and can wear the “Irish-made” label that Sacerdoti and Moran propose in their paper. And the last one, would be the establishment of the relation basis between Northern Ireland and the European Union via a Protocol. The main aim of this proposal would be, in terms of trade, avoiding the hard border between the two Irelands regarding all the products that are essential in the “basket” of importations, favouring this kind of trade. The essentialness

of the products would be changing with the market necessities. The point that we are separating the products that are not important from the ones that can be categorised as important, lies in the fact that create a free trade area, without taking into account the economic sphere of the operators (one of the operators would be inside the European Union, but not the other one) could lead to some abuses from some economic operators. Obviously, the political situation in the island would be affected of this proposal, but, as the UK must defend their interest regarding trade in Northern Ireland, the European Union must also defend their Member States, in this case, the Republic of Ireland.

## 5. CONCLUSIONS

The GFA is, without a doubt, the pillar of the Irish border negotiations in Brexit's framework. From the beginning of Brexit, the Agreement played a very relevant role at the negotiating table on the border and both the European and British teams knew that without the protection of this Agreement, there was a chance that Brexit would materialize without any agreement.

This document is the end of a bloody 30-year confrontation on the Northern Ireland territory, and its protection is key for relations between the EU and the UK to go down a path of cordiality and friendship. Furthermore, the influence of the EU with the PEACE program gives more importance to the protection and role of the Good Friday Agreement in these negotiations, so this programme, although the UK is no more a EU member and this mechanism was created by the EU institutions in 1995, would be necessary to continue with this project, due to the moderate success that it has in the territory.

We know that the GFA is the fundamental pillar of the negotiations but, although this Agreement was signed during the UK's membership in the EEC/EU, we can verify our thesis (The Brexit can break the *entente cordiale* established in 1998 with the Good Friday Agreement). The Brexit (a hard one) is capable to break the situation established in 1998 with the signature of the Agreement. The GFA created an "Aristotelian virtue" between the two Irelands, and with the influence of the PEACE programme from the EU, created in 1995, although there still are some situations of confrontation in the northern Irish territory.

The possibility of the Brexit became hard, even in the end of the Implementation period, is a fear that the population of the border between Northern Ireland and the Republic of Ireland have. The absence of any kind of agreement between the parts could lead to reopen old wounds that, 22 years after the end of the armed conflict, are still healing in the both Irish societies. The solution that the negotiations teams have to reach, must find another middle way that can effectively fit in all sense with the GFA.

**FIRST:** Answering the first question we ask in the introduction of this paper (*what would be, in the framework of Brexit (in the territory of the island of Ireland), the solution so that the establishment of a hard border between the two Irelands can be effectively avoided?*), our conclusion lies in the fact that the best solution is the one that defends both Irelands interests, but also the interests of the EU and the UK. As we said before, and it is been confirmed during the paper, this is not an easy solving problem. In this matter, we are not only talking about trade, since the problem transcends to a more social and political sphere. As stated before, the interests of the two Ireland should be the main objectives in the negotiations, but it is evident that, being these two territories,



members of two different unions (EU and UK), there is a risk that the interests of the unions prevail over those of the affected territories.

Each one of the proposed solutions, including the reunification of the island, are proposals that have their advantages and disadvantages. Nonetheless, our plan we consider is the best option, as it includes the three best “solutions” analysed. The creation of a Protocol with the structure that we have described at the beginning of the previous section creates, in our opinion, a good legal basis to establish good relations between Ireland and Northern Ireland, avoiding a hard border in terms of trade and defending the interests from both sides in the negotiation. As we also said at the beginning of the previous section, this solution is exclusively based on trade, since we believed that the perspective of freedom of movement of people was well established with the CTA. We understand that the advantages outweigh the disadvantages in many aspects, although Northern Ireland's failure to participate in the CAP and CFP is a major disadvantage.

A Protocol between an EU Member State and a non-member State, such as the situation presented to us, which includes the basic regime of relations between them, the established contingency plan, the new product traceability regulation and a control system operated by the institutions created from the GFA, we understand that it creates the most perfect situation to avoid establishing a hard border between the Republic of Ireland and Northern Ireland.

The other reason why we understand that this is the best option, lies in the fact that if the control of the correct application and non-violation of the Protocol resides in the institutions created from the GFA, we are protecting the agreement, and consequently, we are maintaining relations between the participants at the point where it were established in 1998.

**SECOND:** In the framework of the relations and accession of Ireland and the UK to the EEC, we can conclude that, although relations during the first years of accession were tense due to the armed conflict in Northern Ireland, the accession of Both countries to the EEC in 1973 were not only an advantage in the commercial and economic spheres for both the new States and those already within the EEC, but also meant a gradual improvement in relations between the two countries. Recall that the GFA was signed during the membership of both countries in the EEC, so it is evident that relations underwent an improvement within the Community, and later the EU.

Therefore, we can conclude that being a member of the EEC/EU at the same time, was a benefit to improve the cold and tense relations between both countries. It must also be said that, although the effective aid of the Community came a little later than it would have been ideal (in 1995), the PEACE program has been important to the process of reconciliation between societies, and if we emphasize that this has reached a fourth

phase, we can understand that it has had sufficient success so that both Northern Ireland and the UK, the Republic of Ireland and the EU have continued to implement, not only financial aid to the border area between the two Irelands, but also social reconciliation and education programs for young people and families who have been at odds for decades.

The fact that it was the Irish and British Governments themselves that took the first step to start the peace process to a conflict that in 30 years took the lives of 3500 people, is indicative that membership in the Community was a point of inflection in the management of relations between the two countries and in the will to establish a peace that was urgently needed.

**THIRD:** The importance of the Irish border in the context of Brexit is fundamental. Part of the good relations between the EU and the UK go through the establishment or not of a hard border in the island territory.

From the first moment in which the referendum on the permanence or not of the UK in the EU was put on the table, part of the eyes focused on the neighbour island. It is true that with the GFA an entente was established that kept the conflict away, but as we have already established before, Brexit itself has jeopardized that entente and even, if at the end of the transition period there is no agreement, the GFA could be in danger. There is no room for false steps or legal loopholes as to how the border between the two Irelands should be established, in the event that one has to be finally established. Peace in Ireland was achieved thanks to the understanding between the Irish and British governments and the financial, social and institutional support of the EU.

It has already been proven that the conflict in the border territory goes beyond the commercial or political sphere. It is a religiously based social conflict that has been installed in the Northern Ireland area for many years and it is evident that the establishment of a hard border between the two Ireland can trigger a violation of the GFA by those who do not want to be separated from the republican area of the island, where friends or family are found.

Therefore, we understand that the solution that must be established, once again, is to avoid at all costs the totally hard border, always, defending the interests of Republic of Ireland and Northern Ireland and the Unions which each one belongs to.

**FOURTH:** Brexit has been, without a doubt, the most controversial situation of the last decades in the territory of the EU. For the first time in history, a Member State of the Union decided to abandon the project started in 1952 with the ECSC and in 1957 with EEC. Although it is true that the UK was the most Eurosceptic country of the group of Member States of the EU nothing foreshadowed that said Euro-scepticism would end up winning the battle.

If Brexit has become effective, we must conclude that it was, first, because at no time was it calculated that the LEAVE side would win the referendum held on July 23, 2016. It is true that the holding of that referendum depended on the victory of the Conservative party in 2015, and in fact, Cameron was enslaved by his words when he saw himself the winner with an absolute majority of those elections in the UK. But the mistake that many made was not giving enough credit to those in favour of withdrawing from the Union.

We can conclude, then, that Brexit has been a set of catastrophic misfortunes (for the UK itself and for the EU) within a country that, even with the *Optim-out* system established for them, being outside the monetary Union, not being part of the Schengen area and creating From the British check in 1984, the misinterpretations of Eurosceptic parties (UKIP above all) made the withdrawal from the EU a fact.

Let us emphasize the fact that the basis of the Brexit campaign, or most of it, was based on the slogan "Take back control", referring to border and immigration control. As previously stated, and is evident from the work, the UK, like Ireland, was never part of the Schengen Agreements, so even being part of the EU, border control was always in hands of the British authorities.

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